Supreme Court, U.S.
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No.

In The
Supreme Court of the United States
October Term 1986

LORRAINE LE BEAU, et al.,
and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent,

v.

LIBBEY-OWENS FORD COMPANY
and
LOCAL 19, UNITED GLASS AND CERAMIC WORKERS,
Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION OF LOCAL 19, UNITED GLASS AND CERAMIC WORKERS FOR WRIT OF CERTIORARI

Of Counsel:

ANDREW J. O'CONNOR, ESQ.
130 East Madison Street
Ottawa, Illinois 61350
815/434-6206

TERRENCE E. KIWALA, ESQ.
BETH L. BEUCHER, ESQ.
ROOKS, PITTS AND POUST
55 West Monroe Street
Suite 1500
Chicago, Illinois 60603
312/372-5600

Attorneys for Local 19, United Glass and Ceramic Workers

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Seventh Circuit adopted a standard for granting an award of attorneys fees to a prevailing defendant in a Title VII action which conflicts with this Court's standard in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* because it invades the province of the district court in its exercise of discretion.

2. Whether the Court of Appeals for the Seventh Circuit adopted a standard for the award of attorneys fees which conflicts with standards developed in other Circuit Courts regarding the determination of whether or not a plaintiff's action will be considered frivolous, unreasonable, or without foundation.

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LOCAL 19, UNITED GLASS AND CERAMIC WORKERS,
Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Local 19, United Glass and Ceramic Workers, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

This Title VII action was tried before United States District Court Judge James B. Parsons, without a jury, from October 6, 1981 to November 11, 1981, and judgment was entered in favor of defendants Libbey-Owens-Ford Company and Local 19, United Glass and Ceramic Workers (hereinafter referred to as "LOF" and "Local 19"). The memorandum opinion and order dated March 31, 1982 on

the merits is reprinted at Appendix E (hereinafter "App.") to this petition. The opinion of the Seventh Circuit Court of Appeals affirming that judgment is reported at 727 F.2d 141 (7th Cir. 1984) and is reprinted at App. D.

LOF and Local 19 moved for an award of attorneys fees against the Equal Employment Opportunity Commission (hereinafter "EEOC") only, and not against the individual plaintiffs, on the basis that the EEOC's action was frivolous, unreasonable or without foundation. Judge Parsons granted the award. The memorandum opinion and order dated December 17, 1984 granting the award of attorneys fees is reprinted at App. C.

The opinion of the Seventh Circuit Court of Appeals reversing the award of attorneys fees by a vote of two to one is reported at 799 F.2d 1152 (7th Cir. 1986) and is reprinted at App. B. The Seventh Circuit's order denying the petition for rehearing and suggestion for rehearing *en banc* by a vote of six to four is reported at 808 F.2d 1272 (7th Cir. 1987) and is reprinted at App. A.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on August 22, 1986. A petition for rehearing and suggestion for rehearing *en banc* was denied on January 7, 1987. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k):

> **Attorney's fee; Liability of Commission and United States for costs**
>
> (k) In any action or proceeding under this subchapter the court, in it discretion may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as

a private person.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(b):

> **Reliance on interpretations and instructions of Commission**
>
> (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person or an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

Illinois Female Employment Act, Ill.Rev.Stat., Ch. 48, § 5:

> **Limitation on hours of labor of females**
>
> § 5 No female shall be employed in any mechanical or mercantile establishment, or factory, or laundry, or hotel, or restaurant, or barber shop or beauty parlor, or telegraph or telephone establishment or office thereof, or in any place of amusement, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or in any public or private institution or offices thereof,

incorporated or unincorporated in this State, more than eight hours during any one day nor more than forty-eight (48) hours in any one week. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four hours of any day.

STATEMENT OF CASE

A.

BACKGROUND

Beginning in 1909, Illinois enforced a law called the Illinois Female Employment Act which provided that women could not be employed at work for more than eight hours in any one day nor more than forty-eight hours in any one week. Ill.Rev.Stat., Ch. 48, § 5 *et seq*, App. G. Shortly after 1930, LOF began making glass for automobiles at its plants in Ottawa, Illinois. Beginning in 1935, Local 19 and its International Union were the bargaining representatives for the male and female production workers at the Ottawa plants. At all relevant times, the Illinois employment law prohibiting overtime for women was enforced by the Illinois Department of Labor and was obeyed by LOF and Local 19.

Production of glass for automobiles by its nature requires a certain amount of overtime work. Some glass making operations required more time than others. In order to keep production steady, some operations had to be continuous while others did not need to be. This situation was referred to as balancing.

In order to comply with the Illinois Female Employment Act, women who were employed full-time at LOF's facilities in Ottawa were assigned to work in non-continuous operations where overtime was less frequently required because operations could be stopped or speeded up as necessity dictated. Overtime was also avoided in these operations by hiring part-time employees who were

listed on an "extra board" in order of seniority and were called in for work as replacements for absentees or when extra production was needed. When called in, the part-time women employees had an absolute right of refusal which they often exercised. Full-time women employees were hired in order of seniority from those on the extra board who wanted to work full time.

Under this system women were able to be employed, despite the nature of the work which required overtime, in compliance with the Illinois law which prohibited overtime work for women.

After World War II, when the making of automobile glass was resumed at the LOF plants in Ottawa, women were transferred and assigned to work in two departments, the Plastics and Assembly Departments, where the non-continuous operations were concentrated. This was done in order to comply with the Illinois Female Employment Act which was again in force after having been suspended during the war. The prewar extra board procedure for part-time women employees was resumed.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, became effective on July 2, 1965. The pertinent provisions of Title VII provided that it was an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> 42 U.S.C. 2000e-2(a), App. F-1.

Virtually the same proscriptions applied to labor organizations. 42 U.S.C. 2000e-2(c), App. F-1.

With the enactment of Title VII, the extra board system at LOF's plants in Ottawa became suspect. Employers and unions such as LOF and Local 19 were faced with a conflicting, confusing and uncertain situation regarding how to comply with Title VII and yet not violate Illinois law.

LOF and Local 19 were completely aware of Title VII and of its possible effect on sex discrimination in the State of Illinois which had conflicting requirements. LOF and Local 19 carefully studied how to comply with Title VII. They took special note of two relevant provisions in Title VII: (1) Section 703(e) which provides an exception for employment where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business, 42 U.S.C. 2000e-2(e) App. F-2; and (2) Section 713(b) which provides a defense to liability for violations of Title VII for any person who has committed an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in relation to any written interpretation or opinion of the EEOC. 42 U.S.C. 2000e-12(b) App. F-3. A written interpretation or opinion by the EEOC included the EEOC's guidelines which were published in the Federal Register.

Prior to the effective date of Title VII, LOF advised its personnel managers that it would comply with Title VII, but that it was "in the dark" as to how it would be administered, and would have to proceed carefully until guidelines were established by the EEOC as to the meaning of non-discrimination because of sex.

In November 1965, the EEOC issued its first guidelines on sex discrimination. The guidelines were published in the Federal Register on December 2, 1965 and discussed the conflict between Title VII and state laws which

prohibited female overtime work. The guidelines stated in pertinent part:

> Probably the most difficult area considered in these guidelines is the relationship of Title VII to state legislation designed originally to protect women workers. The Commission cannot assume Congress intended to strike down such legislation.
>
> (c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception.
>
> (1) An employer, accordingly will not be considered to be engaged in an unlawful practice when he refuses to employ a woman in a job in which women are legally prohibited from being employed or which involve duties which women may not legally be permitted to perform because of hazards reasonably to be apprehended from such employment.
>
> 29 C.F.R. § 1604.1(c)(1) (1965), App. H.

After the effective date of Title VII and the publication of the EEOC guidelines in 1965, LOF and Local 19 continued the previously established employment practices for women at the Ottawa plants believing that in complying with Illinois law they were not in violation of Title VII. After the effective date of Title VII, Illinois continued to enforce the Female Employment Act. As late as January 1969, LOF requested permission from the Illinois Department of Labor to allow a female office employee to work overtime. The request was denied and LOF was advised by the Illinois Department of Labor that Title VII was not intended to "disturb any State laws limiting the hours of employment for women" and that "we continue to enforce this labor statute."

On August 15, 1969, however, the EEOC reversed its position as to state female protective laws and amended its guidelines to state that such laws were in conflict with Title VII and could not be the basis for the bona fide occupational qualification exception to Title VII. The "new and reversed" guidelines were published in the Federal Register, and provided in pertinent part as follows:

> The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.
>
> 29 C.F.R. § 1604.1(2) (1969), App. I.

After publication of the EEOC's reversed position on state female protective laws, LOF promptly began to take steps to eliminate the aforementioned employment practices in Illinois and in other states where it had continued to use them after the effective date of Title VII as required by the state laws and in reliance on the 1965 EEOC guidelines. This change could not be made at once. There had to be studies of the several states where LOF's plants were located, new procedures had to be worked out where needed, the labor unions had to be consulted, and new labor agreements had to be drawn up and executed for the locations effected. This process was completed for the Ottawa plants on March 5, 1970. After that date, women and men at Ottawa were hired on exactly the same basis, women were hired for work in all areas of production, and the ex-

tra board system was eliminated.

It is without dispute in this case that there was no sex discrimination at LOF's Ottawa plants at any time after March 5, 1970. It is also without dispute that before March 1970 there had never been any complaint by any woman about the employment practices of LOF at Ottawa, about any claimed sex discrimination, about assignment to part-time work, about use of the extra board system, or about any other matter included in this action. There had been no grievances filed through the normal methods for handling claimed mistreatment. There had never been any request by any woman for transfer from her assigned work to some other department of production. Although the claimed sex discrimination had been practiced without protest for several years after the effective date of Title VII, it was not until after such conduct had wholly ceased on March 5, 1970 that a charge was filed with the EEOC.

B.
TRIAL COURT DECISION ON THE MERITS

On August 3, 1971, certain individual plaintiffs, Lorraine LeBeau and other female employees at LOF's Ottawa facilities, brought suit against LOF and Local 19. The plaintiffs alleged that LOF and Local 19 violated Title VII of the Civil Rights Act of 1964, by discriminating against women at the Ottawa facilities because women were restricted to employment in two departments, were placed on sex segregated seniority lists, and were subject to a separate system of assignment, lay off, and recall. Plaintiffs alleged that these acts were done with the agreement and acquiescence of the employees' union, Local 19. In their complaint, the plaintiffs acknowledged that the claimed discriminatory practices had in fact ceased, and notwithstanding the allegation of mere "residual effects" of the alleged discrimination, the plaintiffs sought injunctive relief as well as an award of back pay.

On May 20, 1975, the EEOC filed its motion to inter-

vene which was granted on June 26, 1975. The EEOC proceeded in this action as an intervening plaintiff, and thereafter, took over management of the plaintiffs' suit as a class action. The EEOC filed its own complaint which alleged that LOF and Local 19 had discriminated, and were currently discriminating, against female employees at the Ottawa facilities by maintaining policies and practices with respect to hiring, assignment, compensation and other terms of employment which denied women an equal employment opportunity. The EEOC's complaint sought injunctive relief and a back pay award. Three years later in an amended complaint, the EEOC deleted its allegations of continuing discrimination, dropped its request for injunctive relief, and sought only an award of back pay for the individual plaintiffs.

Throughout discovery, and during the trial of this matter, LOF and Local 19 asserted the defense of good faith reliance on the EEOC's own guidelines which had interpreted state protective laws regarding female employment as not being in conflict with Title VII. During six years of discovery and at trial, the following evidence was established: full-time employment of women in most departments of the plants could not effectively be accomplished without risk of disobeying the Illinois Female Employment Act; part-time employment in the Plastics and Assembly Departments was desirable from LOF's point of view and suited the desires of the majority of women; employment of women under those circumstances required that they be placed on a separate seniority list; the EEOC within a short period of time following the effective date of Title VII issued guidelines which stated that federal law would not be violated by compliance with state protective laws; as soon as the EEOC reversed its position four years later and ruled that a conflict existed between federal and state law, LOF and Local 19 immediately proceeded to change the program of female employment in order to comply with the literal language of Title VII; and, no discriminatory

conduct occurred at any time subsequent to the implementation of the revised program of employment on March 5, 1970.

Following a six-week bench trial, District Court Judge James B. Parsons entered judgment in favor of LOF and Local 19 and against the EEOC on all issues and denied the back pay relief sought by the individual plaintiffs. Judge Parsons found that the evidence overwhelmingly established that the conduct of LOF and Local 19 was in fact based on their good faith reliance on the published guidelines of the EEOC and the Illinois female protective law, and that this "was not shaken by cross-examination of witnesses or by any contradictory evidence." App. E-21, E-26. Judge Parsons concluded that:

> The E.E.O.C. in all fairness should not be heard to condemn defendants for having followed its guidelines; and the defendants having further established that their reliance both on the Illinois Female Employment Statute and the guidelines of E.E.O.C. was in fact in good faith, the individual plaintiffs (Lorraine Le Beau, et al.) should not be permitted to reap a financial harvest out of conduct concerning which they never complained until after it was voluntarily discontinued when E.E.O.C. withdrew its approval.
>
> App. E-28.

On April 12, 1982, Local 19 filed its motion for allowance of attorneys fees against the EEOC because judgment had been entered in favor of Local 19 and against the EEOC on all issues, and Local 19 as the prevailing party was entitled to an allowance of reasonable attorneys fees as part of its costs pursuant to Section 706 of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(k). While Local 19's motion for attorneys fees was pending, the EEOC on May 28, 1982 filed its notice of appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 31, 1982. On June 11, 1982, Local 19 and LOF filed their notice of cross-

appeals from that same judgment regarding the EEOC's intervention in the action.

C.

THE COURT OF APPEALS DECISION ON THE MERITS

On February 3, 1984, the Court of Appeals for the Seventh Circuit in an unanimous decision affirmed the judgment of the District Court on the merits of the action. *LeBeau v. Libbey-Owens-Ford*, 727 F.2d 141 (7th Cir. 1984), App. D. On appeal, the EEOC did not challenge any of the factual findings or evidentiary rulings made by the District Court. Instead, the EEOC re-argued its theory that the 1965 guidelines did not authorize, but rather, prohibited the employment practices of LOF, and that LOF and Local 19 had not relied in good faith on the 1965 guidelines because they made no "actual decision" to rely on them. The Seventh Circuit firmly rejected the EEOC's interpretation of its guidelines as "unreasonable."

The Seventh Circuit held that the 1965 guidelines as published "furnished no support for the [EEOC's] argument . . . that the guidelines do not authorize compliance with the Illinois Act, much less that they prohibit such compliance." App. D-12. The Seventh Circuit examined the language of the 1965 guidelines and found that it clearly stated that state protective laws would be a basis for application of the bona fide occupational qualification exception precluding liability under Title VII. App. D-12, D-13.

The Seventh Circuit found the language of the bona fide occupational qualification exception to Title VII itself to be compelling in rejecting the EEOC's argument, and noted that Section 703(e) of Title VII provided that:

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide

> occupational qualification reasonably necessary to the normal operation of that particular business.
>
> App. D-13.

The Seventh Circuit held that in order to comply with the Illinois Female Employment Act, LOF had to devise a separate employment program for women, and this conduct met the definition of "a bona fide occupational qualification reasonably necessary to the normal operation" of LOF's business at the Ottawa facilities. Therefore, such conduct could not be a violation of Title VII. App. D-13, D-14.

The Seventh Circuit also noted that prior precedent had already determined the meaning of the 1965 EEOC guidelines. This prior precedent held that the EEOC's ruling in its guidelines, that good faith reliance on state female protective laws such as the Illinois act, constituted a legitimate exception to liability under Title VII. The Seventh Circuit commented that the District Court's conclusion in this action as to the meaning of the 1965 EEOC guidelines was "fair, reasonable, and in accord with the precedent in this Court." App. D-14.

The Seventh Circuit also agreed with the District Court that the evidence presented at trial of Local 19 and LOF's reliance in fact on the 1965 EEOC guidelines was overwhelming. The Seventh Circuit found the following facts to be further evidence of their reliance on the EEOC guidelines: that LOF immediately acted to change its employment practices once the EEOC reversed its position in its guidelines in 1969, and that after March 5, 1970 men and women were employed under the same conditions regardless of what Illinois law required. App. D-15. The Seventh Circuit concluded that there was no basis for setting aside the District Court's finding that Local 19 and LOF had relied in good faith on the 1965 EEOC guidelines.

The Seventh Circuit also approved of the District Court's conclusion that regardless of reliance on the EEOC guidelines, reliance alone on the Illinois Female

Employment Act was a sufficient reason for denial of a back pay award to the individual plaintiffs. The Seventh Circuit noted there was abundant authority for this view not only within the Seventh Circuit, but in other Circuits as well, and cited *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974) as "near precedent . . . for the case at bar." App. D-16.

The Seventh Circuit also held that denial of a back pay award to the individual plaintiffs was proper because the plaintiffs had not met their burden to show that each was "a potential victim of unlawful discrimination." App. D-18. None of the plaintiffs had ever asked to work more overtime, had ever asked to be placed on a different seniority list, or had ever asked to be transferred to another department. The plaintiffs made no showing that they would have accepted overtime assignments, would have transferred to another department, or would have otherwise acted to increase their economic benefits. App. D-18.

D.

TRIAL COURT DECISION AWARDING ATTORNEYS FEES TO LOCAL 19

Following the appeal on the merits, Local 19 and LOF renewed their motions before Judge Parsons in the District Court on April 27, 1984 for attorneys fees against the EEOC and requested reasonable attorneys fees for the trial and appellate work done in this matter. Memorandums in support and in opposition to the motions for attorneys fees were filed. Local 19 also filed affidavits of the attorneys who worked on this matter on its behalf and statements of services rendered by the attorneys. The statements for services rendered were the actual bills charged to Local 19 by its attorneys from the time of the EEOC's intervention in June, 1975 up to, and including, June, 1984. The statements identified the attorneys who performed the work, gave a detailed description of the work performed, stated the amount of time spent for each entry, and stated the

rate per hour charged for the work.

The total amount of attorneys fees requested by Local 19 against the EEOC was $139,870.88. None of the fees sought concerned the EEOC's legal right to intervene in this action because Local 19 did not prevail upon this issue in its cross-appeal. The total amount of fees sought was calculated by multiplying the number of hours worked by the billing rate and did not include any adjustments or use of multipliers.

Applying the standard set forth by this Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), Judge Parsons found that Local 19 and LOF were prevailing defendants and that the EEOC's action was unreasonable. The District Court granted the award of attorneys fees. Memorandum Order and Opinion dated December 17, 1984, App. C.

In order to determine whether the EEOC's action was frivolous, unreasonable or groundless, the District Court examined the suit in light of certain factors enumerated by the Seventh Circuit in *Reichenberger v. Prichard*, 660 F.2d 280, 288 (7th Cir. 1982) to serve as an aid in its determination. The factors in *Reichenberger* are:

1. Whether the issue involved in the case was one of first impression requiring judicial resolution,
2. Whether the controversy was sufficiently based upon a real threat of injury to the plaintiff,
3. Whether the trial court makes a finding that the suit was frivolous under the *Christiansburg* guidelines; and
4. Whether the record will support such a finding.

App. C-2

The District Court found that the EEOC's action was clearly not one of first impression requiring judicial resolution. It noted that there had been other cases which had litigated the issue of state protective laws which conflicted with Title VII and these cases were known to the EEOC

prior to its intervention in this action. One case in particular, *Raitz v. Libbey-Owens-Ford Glass Co.*, No. 70-99 (N.D. Ohio, Sept. 23, 1973), held that as a matter of law where an unresolved conflict between state and federal statutes had been interpreted by the EEOC favorably to the state statute, this placed the employer "upon the horns of a dilemma" who could not then be charged with having violated federal law when its conduct was in reliance on the EEOC's interpretation. App. C-3.

With regard to the second factor, the District Court found there was no real threat of injury to the plaintiffs because any discriminatory practices regarding the women employees had ceased in March 1970. This was twelve years prior to the trial of this matter, and five years prior to the EEOC's intervention in the action. App. C-3.

With regard to the third and fourth factors, the District Court again scrutinized the evidence presented at trial regarding the EEOC's 1965 guidelines and LOF and Local 19's reliance upon them which served as the basis for application of the bona fide occupational qualification exception from liability. The District Court held that for the EEOC to join in the plaintiffs' lawsuit and to vigorously proceed against LOF and Local 19 in light of its own guidelines was "the apex of unreasonableness." App. C-4. Referring to its prior opinion, the District court repeated its statement that "the EEOC in all fairness should not be heard to condemn defendants for having followed its guidelines . . . . " App. C-4. The District Court also found the EEOC's appeal on the merits to be unreasonable.

The District Court found the attorneys fees requested by both Local 19 and LOF for trial and appellate work to be fair and reasonable and clearly and carefully documented. Judge Parsons reduced the amount of fees granted to Local 19 and LOF each by five percent because they had not prevailed on their cross-appeals regarding the issue of the EEOC's intervention. The total amount of attor-

neys fees granted to Local 19 and LOF by the District Court was $132,877.00 and $181,100.00, respectively. On February 9, 1985, the EEOC filed its notice of appeal to the United States Court of Appeals for the Seventh Circuit from the order awarding attorneys fees.

E.

THE COURT OF APPEALS DECISION REVERSING THE AWARD OF ATTORNEYS FEES

On August 22, 1986, the Seventh Circuit held in a two to one decision that the District abused its discretion in awarding the attorneys fees and reversed the lower court's decision.

In reversing the fees award, the majority opinion criticized the District Court for placing too much reliance on the facts as found at trial to support a finding that the suit should not have been brought. App. B-15. The majority concluded that the the EEOC's action should be judged in light of the evidence that the EEOC "sought to establish," "attempted to bring out," or "tried to show" at trial. App. B-17. The majority held that the EEOC's action was not frivolous because at trial the EEOC attempted to establish a theory of liability that LOF and Local 19 had violated Title VII because their reliance on the Illinois Act and the 1965 guidelines was not in good faith, but rather was merely a pretext.

The dissent contended that the EEOC's action should be judged in light of the evidence that the EEOC could reasonably have believed could be introduced at trial, and not based upon the EEOC's unfounded expectations of what it hoped to prove at trial. The dissent concluded that the EEOC's action was frivolous because, based upon the entire record, it could not be found that the EEOC could reasonably have believed that it could establish that LOF and Local 19 had violated Title VII in the absence of any reasonable evidence at trial to support its contentions. The

dissent found the EEOC's action to be frivolous especially in light of the EEOC's failure to offer any explanation for the discrepancy at trial of what it attempted to, and what it actually established at trial. App. B-28 - B-29.

The majority opinion also concluded that the EEOC's action was not frivolous because it had withstood summary judgment even though the EEOC did not prevail at trial. App. B-10 - B-12. In this regard, the majority stated "when a trial judge rules that there are facts under which a plaintiff can prevail, it is highly inconsistent for him to later find the suit frivolous because it is foreclosed as a matter of law." App. B-12.

The dissent contended that it was consistent for the District Court to deny summary judgment, and then after trying the case, find that the EEOC's action was frivolous, and cited numerous decisions from other courts where this had occurred. App. B-31 - B-32. The dissent argued that denial of summary judgment in no way suggested that the EEOC's action was not frivolous because the trial judge's function at that stage is simply to determine whether there is a genuine issue for trial because evidence is disputed. It was not his function at that time to weigh the evidence and determine the truth of the matter. App. B-30.

Despite acknowledging its earlier finding in the merits opinion that the EEOC's interpretation of its 1965 guidelines as they pertained to this action was unreasonable, the majority opinion held that its prior rejection of the EEOC's arguments did not make these arguments frivolous. App. B-20 - B-21. The majority opinion now found the EEOC's interpretation to be within the fair meaning of the words of the guidelines. App. B-21.

The dissent noted that this contradiction flawed the majority opinion. The dissent reasoned that not only was the EEOC's action frivolous at the time of its intervention because there was no reasonable evidence to show that defendants had violated Title VII, but its con-

tinued prosecution of the action approached bad faith because it could not reasonably have believed that it could demonstrate such a violation at trial. App. B-38 - B-39.

On January 7, 1987, the active members of the Seventh Circuit voted six to four against accepting the petition for rehearing and suggestion for rehearing *en banc*. The dissenting judge in the Court of Appeals opinion who voted in favor of affirming the attorneys fee award could not participate in the vote for rehearing because he was not an active Circuit Court judge, but rather a Senior Circuit Court judge.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit Majority Opinion Adopts A Standard For The Award Of Attorneys Fees To A Prevailing Defendant In A Title VII Action Which Conflicts With This Court's Standard

This case concerns the invasion by the Court of Appeals into the province of the trial court in determining whether or not to allow the prevailing party its reasonable attorneys fees as part of the costs in an action brought pursuant to Title VII of the Civil Rights Act of 1964. The reason why this Court should grant this Petition for Writ of Certiorari is that the United States Court of Appeals for the Seventh Circuit has decided the attorneys fee award issue in this case in violation of the dictates of this Court.

In *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), this Court established the standard for awarding attorneys fees to a prevailing defendant in a Title VII action. This Court held that

> a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad

> faith. . . . or that the plaintiff continued to litigate after it clearly became so.
>
> *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, supra,* 434 U.S. at 421-22.

In establishing the above standard, this Court observed, through its examination of the legislative history of Title VII, that although Congress "wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n. supra,* 434 U.S. at 420.

In the majority opinion, the Seventh Circuit acknowledged the *Christiansburg* standard, and *yet refused to follow it.* Instead, it used an improper interpretation of *Christiansburg. It substituted its judgment for that of the District Court's in determining the quality of the EEOC's action in this matter.*

This Court has re-emphasized that it is the discretion of the district court which is to be exercised in determining a fees award, and that this is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what are essentially factual matters. *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). In *Hensley,* this Court instructed district courts to provide a concise but clear explanation of its reasons for the fees award, and admonished that a request for attorneys fees should not result in a second major litigation.

The District Court in granting the award of attorneys fees to Local 19 followed this Court's standard in *Christiansburg* and its dictates in *Hensley.* The District Court's opinion on the fees award clearly sets forth the reasons for its finding that the EEOC's action was unreasonable based on the facts and the law. App. C. The District Court judges' decision was based upon his intimate

familiarity with the case gained through presiding over six years of discovery and six weeks of trial. The District Court judge's decision was also based upon his detailed discussion in his merits opinion of the law and the evidence established at trial. App. E.

The District Court judge's involvement in this case since it was assigned to him in 1974 put him in the best position to assess the quality of the EEOC's action, and to determine whether its intervention in and continuation of this action was "frivolous, unreasonable or without foundation." This is particularly true where the Seventh Circuit had carefully reviewed all of the contentions of error made by the EEOC in the merits appeal, and found that the District Court had not made one single error.[1]

The central issue involved in the attorneys fees award was whether the facts and the law supported a finding that the EEOC's prosecution of this action was unreasonable. This was determined in favor of the prevailing defendants by the judge most familiar with the record, the District Court judge. Notwithstanding the well-reasoned opinions by the District Court on the merits of the case as well as on the attorneys fees award, the majority opinion by the Seventh Circuit concluded that the District Court's assessment of the merit of the EEOC's action *seemed to it to be flawed.* The majority opinion believed that the District Court's characterization of the EEOC's position in this action was distorted. *The majority opinion criticized the District Court for placing too much reliance on the facts as found at trial to support the conclusion that the EEOC's action should not have been brought.* App. B-15.

---

[1] The only correction that the Seventh Circuit felt was needed in the District Court's opinion on the merits was its entry of judgment for the individual plaintiffs on liability. The Seventh Circuit characterized this as a mistake which was "a matter more of form than of substance." App. D-11.

By subtly ignoring the *Christiansburg* standard, the Court of Appeals for the Seventh Circuit invaded the province of the District Court by substituting its judgment for that of the District Court and concluding that the EEOC's action was not frivolous. A district court's conclusion on the determination of an attorneys fee award is only to be disturbed if there are *clear* indications in record that the district court was incorrect in its decision. *Munson v. Fiske*, 754 F.2d 683, 697 (7th Cir. 1985).

However, the majority opinion by the Seventh Circuit evaded the proper standard of review by selectively examining the record and characterizing certain events to support its conclusions while completely ignoring the facts which supported the District Court judge's decision. Most importantly, the Seventh Circuit ignored the critical fact that the EEOC had approximately six years of discovery and six weeks of trial to establish evidence of LOF and Local 19's liability under Title VII, however, it failed to come forward with *any* evidence that LOF and Local 19 did not rely on the EEOC's own guidelines in formulating its employment practices. This reliance served as the basis for immunity from liability in this action. No contrary evidence was ever established to challenege this immunity which was based on law and on fact.

The standard established by the Seventh Circuit in this case prevents a plaintiff's Title VII action, or its continued prosecution, from ever being considered frivolous simply on a showing that the plaintiff *tried, but failed,* to prove its theory of liability at trial despite the fact that no legal or factual basis existed to support its theory of liability. This is at variance with the standard of this Court and within the Seventh Circuit. A plaintiff's action is considered frivolous if it is found to have no legal or factual basis. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 420 (1978); *Tarkowski v. County of Lake*, 775 F.2d 173 (7th Cir. 1985). The District Court found that there was no

factual or legal basis for the EEOC's action. The District Court properly judged the quality of the EEOC's action in light of the evidence the EEOC could reasonably have believed could be introduced at trial and not in light of what it *hoped it could prove at trial.* In its present posture, this case holds that a prevailing defendant in a Title VII action cannot recover its reasonable attorneys fees from the EEOC for prosecution of an action based upon the EEOC's interpretation of its guidelines *even though this interpretation was found to be unreasonable and unsupported in either law or fact.*

If this decision is allowed to stand, the Court of Appeals will, as it did in this case, be permitted to improperly assume the role of trier of fact in attorneys fees award actions in Title VII cases, and will allow the Court of Appeals to selectively read the record to overturn a district court's decision in such a case when it is contrary to the view of the Court of Appeals. This standard must be rejected by this Court as being improper.

II.

The Seventh Circuit Majority Opinion Adopts A Standard For The Award Of Attorneys Fees In A Title VII Action Which Conflicts With The Standards Of Other Circuits

The second reason why this Court should grant the Petition of Writ of Certiorari is that the standard established by the Court of Appeals for the Seventh Circuit conflicts with the standards of other Circuit Courts.

The majority opinion by the Seventh Circuit held that the EEOC's action could not be found to be frivolous because it had withstood LOF and Local 19's motions for summary judgment even though the EEOC did not prevail at trial. This standard is at variance with prior precedent in other Circuit Courts which permitted cases to proceed to trial and then later found the action to be frivolous. *See,*

e.g., *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983) (finding suit frivolous after dismissing suit at close of plaintiff's case); *Coleman v. General Motors Corp.*, 667 F.2d 704 (8th Cir. 1981) (finding suit frivolous after 11-day bench trial); *Harris v. Plastics Manufacturing Co.*, 617 F.2d 438 (5th Cir. 1980) (finding suit frivolous after granting motion to dismiss under Fed.R.Civ.P. 41(b) at close of plaintiff's case); and *Carrion v. Yeshiva University*, 535 F.2d 722 (2d Cir. 1976) (finding suit frivolous after dismissing it at close of plaintiff's case).

The District Court's decision on LOF and Local 19's motions for summary judgment must be put into its proper context. The hearing on the motions for summary judgment occurred on May 23, 1979. The District Court's opinion denying the defendants' motions for summary judgment, upon which the majority opinion relies, is simply a two page transcript of the court's decision from the bench. In contrast, the trial transcript consist of 4,493 pages. This hearing occurred *before* the vast majority of depositions took place in this case. In addition, the District Court merely decided that "whether the defendants' good faith reliance on the State Protective Statute is a bar to damages is a question of fact and cannot be decided as a matter of law." App. B-33. In opposing summary judgment, the EEOC contended that it would take as long to brief the motion for summary judgment as it would to try the case. The EEOC argued that the facts of good faith reliance should be put into evidence at the trial of the case rather than preparing lengthy briefs in support of and in opposition to the summary judgment motions. The district court agreed with the EEOC's approach with regard to the summary judgment motions and did not conduct any evidentiary hearings at that time.

The majority opinion incorrectly reasons that the denial of the summary judgment means that the EEOC's suit must have been meritorious. As this Court has stated: "At the summary judgment stage the judge's function

is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

The District Court's determination to deny summary judgment in May 1979 cannot be construed as evidence that the EEOC's action was not frivolous because the District Court judge could not properly weigh the evidence at that time. However, after the conclusion of the bench trial, the District Court weighed the evidence and found that it overwhelmingly established that the conduct of LOF and Local 19 was in fact based on their good faith reliance on the EEOC's guidelines and the Illinois Female Employment Act. The Seventh Circuit also found this evidence to be overwhelming when it affirmed the District Court's decision on the merits.

The Seventh Circuit's decision that denial of a summary judgment motion *precludes* a finding that a plaintiff's action is frivolous is in square conflict with the decisions of the Second, Fifth, and Eighth Circuits. As these Circuits have properly recognized, *it is the entire record, and not isolated rulings, which serves as the proper basis to determine whether or not a plaintiff's action is frivolous.*

In this case, the EEOC never produced any evidence at trial that the individual plaintiffs were victims of unlawful discrimination or even "potential victims of unlawful discrimination." App. D-18. Moreover, the EEOC never produced *any evidence* at trial to refute the established fact that LOF and Local 19 had relied in good faith on the EEOC's guidelines and on the Illinois Female Employment Act.

The majority opinion, in an attempt to shore up its result-oriented decision, chided the District Court for placing too much reliance *on the facts found at trial.* App. B-15. Instead of relying on facts as established, the majority opinion cited various speeches made by EEOC counsel at

trial to support its conclusion that the EEOC's conduct should be judged in light of evidence which the EEOC "sought to establish," "attempted to bring out," or "tried to show" at trial. App. B-17. This is not the proper standard to be applied. It must be remembered that the EEOC in the merits appeal did not challenge any of the factual findings or evidentiary rulings made by the District Court.

Further evidence of the unreasonableness of the EEOC's action as found by the District Court was wholly ignored by the majority opinion. The EEOC's own expert witness, Professor John McDonald, provided evidence which helped prove that LOF and Local 19 could not be liable in this case. The EEOC's expert testified in his deposition one year prior to trial, and at trial, that based upon his exhaustive study and analysis of LOF's time records of employment for the years in question at the Ottawa plants, women did not work overtime and that, in his opinion, there was a relationship between the hours the women worked and the efforts of the defendants to comply with Illinois law. App. E-23-E-24 .

The clear unreasonableness of the EEOC's conduct in this action is that it prosecuted this extensive lawsuit based on its *changed* position as stated in its 1969 guidelines without ever acknowledging that its position *reversed* the 1965 guidelines that LOF and Local 19 had relied upon in good faith, *and that it continued to litigate the action even after it became apparent that it was without factual foundation.* The EEOC's conduct was not only unreasonable, it approaches bad faith. App. B-39. This provides an even stronger basis for awarding attorneys fees. *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978).

The Seventh Circuit should not be permitted to establish a standard which conflicts with the other Circuits which are in compliance with this Court's standard. The Seventh Circuit disregarded the facts found at trial and

selectively singled out one ruling by the trial judge to find that the EEOC's action was not without merit. The District Court's finding that the EEOC's action was unreasonable is supported by the entire record and is in conformity with the standard of this Court and the Circuits that properly follow this standard. The District Court's finding should be reinstated by this Court. If the majority opinion of the Seventh Circuit is allowed to stand, it is clear that, at least in the Seventh Circuit, a district court will not be allowed to award attorneys fees to a prevailing defendant despite its finding that the plaintiff's action was unreasonable.

CONCLUSION

For the reasons stated above, Local 19, United Glass and Ceramic Workers, requests this Court to grant its petition in this case for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Of Counsel:

ANDREW J. O'CONNOR, ESQ.
130 East Madison Street
Ottawa, Illinois 61350
815/434-6206

TERRENCE E. KIWALA, ESQ.
BETH L. BEUCHER, ESQ.
ROOKS, PITTS AND POUST
55 West Monroe Street
Suite 1500
Chicago, Illinois 60603
312/372-5600

Attorneys for Petitioner, Local 19, United Glass and Ceramic Workers

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APPENDIX A

United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 7, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

LORRAINE LE BEAU, et al.,
Plaintiffs,
and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor-Appellant,
No. 85-1242 *v.*
LIBBEY-OWENS-FORD COMPANY, An Ohio Corporation, and LOCAL 19, UNITED GLASS and CERAMIC WORKERS,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 C 1902

James B. Parsons, Judge.

ORDER

This case is before the court on petitions for rehearing and suggestion for rehearing *en banc* filed by Libbey-Owens-Ford Company and Local 19, United Glass and Ceramic Workers. On consideration of the petitions for rehearing, the court on its own motion modifies the opinion as follows:

On page 13, line three of footnote nine, delete the sentence beginning "The first mention . . . ."

On page 15, the last line of the second full paragraph, the citation to the "1982 District Court Opinion at 27 n.5" is modified to "1982 District Court Opinion at 6 n.2 ¶ (5)".

On further consideration of the petitions for rehearing and suggestion for rehearing *en banc*, a vote of the active members of the court was requested and less than a majority* of the members of the court have voted to grant a rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petitions for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing and suggestion for rehearing *en banc* be, and the same are, hereby denied.

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*Chief Judge Bauer, and Circuit Judges Posner, Coffey and Easterbrook voted to grant petitions for rehearing *en banc*. Senior Circuit Judge Eschbach was a member of the original panel, but did not participate in the vote on suggestion for rehearing *en banc*.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1242

LORRAINE LEBEAU, *et al.*,

Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor-Appellant,

v.

LIBBEY-OWENS-FORD COMPANY, An Ohio Corporation, and LOCAL 19, UNITED GLASS AND CERAMIC WORKERS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 1902—James B. Parsons, *Judge.*

ARGUED DECEMBER 13, 1985—DECIDED AUGUST 22, 1986

Before CUMMINGS, *Chief Judge,* CUDAHY, *Circuit Judge,* and ESCHBACH, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* The Equal Employment Opportunity Commission ("EEOC") appeals from an order of the district court granting Libbey-Owens-Ford Company ("LOF") and Local 19, United Glass and Ceramic Workers

("Local 19") the attorneys' fees they incurred defending this Title VII lawsuit.[1] We reverse.

I

The factual background and complicated procedural history of this protracted litigation, now in its fifteenth year, are set forth in detail in our 1984 opinion disposing of the EEOC's appeal on the merits. *LeBeau v. Libbey-Owens-Ford Co.*, 727 F.2d 141 (7th Cir. 1984) (the "1984 Appellate Opinion"). We provide here only those facts that are necessary to understand the issues now before us.

This case has revolved around the impact of Title VII on pre-existing state "protective" labor legislation, which regulated the conditions under which women could work. From 1909 until 1970, when it was declared unconstitutional, *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970), Illinois had such a protective statute in effect. Called the Illinois Female Employment Act, it provided that women could not be employed in factory work for more than eight hours in any one day or more than forty-eight hours in any one week. Laws 1909, p. 212, § 1 (as amended); Ill. Rev. Stat. ch. 48, § 5 (1969).[2]

---

[1] The EEOC also contends that the district court abused its discretion in denying a request for discovery regarding the defendants' submissions on attorneys' fees. Because we hold that the district court abused its discretion in awarding fees, we need not reach this issue.

[2] No female shall be employed in any mechanical or mercantile establishment, or factory, or laundry, or hotel, or restaurant, or barber shop or beauty parlor, or telegraph or telephone establishment or office thereof, or in any place of amusement, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or in any public or private institution or offices thereof, incorporated or unincorporated in this State, more than eight hours during any one day nor more than forty-eight (48) hours in any one week. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four hours of any day.

The act was enforced with criminal penalties. On the other hand, Title VII provides that it is an unlawful employment practice for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(2). Virtually the same proscription applies to labor organizations. *Id.* § 2000e-2(c)(2). Thus, when Title VII became effective a conflict arose as to the application of the federal in relation to the state law.

In November 1965 the EEOC issued the following guidelines, stating its position on the conflict:

> The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. So, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women.
>
> (1) An employer, accordingly, will not be considered to be engaged in an unlawful employment practice when he refuses to employ a woman in a job in which women are legally prohibited from being employed or which involve duties which women may not legally be permitted to perform because of hazards reasonably to be apprehended from such employment.
>
> (2) On the other hand, an employer will be deemed to have engaged in an unlawful employment practice

> if he refuses to employ or promote a woman in order to avoid providing a benefit for her required by law—such as minimum wage or premium overtime pay.
>
> (3) Where state laws or regulations provide for administrative exceptions, the Commission will expect an employer asserting a bona fide occupational qualification pursuant to this paragraph to have attempted in good faith to obtain an exception from the agency administering the state law or regulation.

29 C.F.R. § 1604.1(c) (1965); 30 Fed. Reg. 14,927.

In August 1969, the EEOC changed its position on state protective legislation and amended its guidelines to state that such laws conflicted with Title VII and could never be the basis for a bona fide occupational qualification exception. See 45 Fed. Reg. 13,367 (August 19, 1969); 29 C.F.R. § 1604.1(b)(2) (1970).

LOF operates two plants in Ottawa, Illinois, which make automobile windshields and other automotive glass products. Until 1970, LOF segregated its production workforce by sex, allowing women to work only in "plastics" and "assembly." Women were maintained on a separate seniority list ("Plastic and Assembly Girls") and were subject to a different system for layoff and recall. The most senior female employees worked fulltime in either plastics or assembly; the more junior were maintained on a list, called the "extra board," from which they were called in if a replacement or an extra worker were needed. In late 1969 and early 1970, LOF took steps to eliminate the sex-segregated system at Ottawa. The process was complete by March 1970.

Also in March 1970, eleven days after the LOF switchover was complete, plaintiff LeBeau and other female employees at Ottawa filed a charge with the EEOC alleging sex discrimination at Ottawa. (No such charge had ever been filed while the discriminatory system was in place.) Upon receiving their "right to sue" letter from the EEOC, the women filed this suit in federal district

court for the Northern District of Illinois on August 3, 1971. They claimed that the defendants had (1) segregated departments and jobs by sex; (2) maintained sex-segregated seniority lists; and (3) operated sex-segregated systems of job assignment, layoff and recall—all in violation of Title VII. They also alleged continuing gender discrimination and sought both injunctive and monetary relief.

In June 1975 the EEOC intervened in this action as a party plaintiff and filed a complaint claiming that the defendants had discriminated and were currently discriminating against female employees at Ottawa by maintaining policies and practices with respect to hiring, assignment, compensation and other terms of employment that denied women equal employment opportunity. Three years later, in October 1978, the EEOC was granted leave to file an amended complaint, which omitted any reference to continuing discrimination and any prayer for relief beyond backpay. In this posture, as a suit for backpay as a result of discrimination between July 2, 1965 and March, 1970, the suit survived motions to dismiss and for summary judgment and finally went to trial in October and November 1981. In March 1982 the district court entered judgment for the women plaintiffs on the issue of liability but for the defendants "on the question of back wages."[3] It found for the defendants as against the EEOC on all issues.

In the Memorandum Opinion accompanying the order, *LeBeau v. Libbey-Owens-Ford Co.*, No. 71-C-1902 (Mar.

[3] As we noted in the merits appeal, the district court probably erred in entering judgment for the individual plaintiffs on the issue of liability. Section 713(b), 42 U.S.C. § 2000e-12(b), states that no person "shall be subject to *liability*" (emphasis supplied) if he proves good faith reliance upon the EEOC's written interpretation of the law, and the district court ruled that the defendants had made out such a defense. As we also noted earlier, "this is a matter more of form than substance," 1984 Appellate Opinion, 727 F.2d at 147.

31, 1982) (the "1982 District Court Opinion"), the district court acknowledged that the plaintiffs had made out a prima facie case of gender discrimination, *id.* at 14. It noted that the defendants raised as affirmative defenses their reliance upon the EEOC's 1965 guidelines and the terms of the Illinois protective statute and it found that they had met their rebuttal burden:

> I conclude that the defendants have proved by a preponderance of evidence reliance upon the Illinois laws in support of their practices, and reliance upon the guidelines of E.E.O.C. itself in continuing their reliance upon the state law. I conclude that the government is equitably estopped from claiming that the defendants violated the Act of 1964, and that the individual plaintiffs, although they established a *prima facie* case under the Act, are equitably estopped from asking damages, in the form of claimed back wages or any other form.

Id. at 30.

The EEOC appealed this ruling. It argued that the defendants were not entitled to a defense of good faith reliance upon the Illinois protective statute because they had not shown that the full range of their discriminatory practices was mandated by the statute. To deny backpay in the absence of an actual conflict, it asserted, would frustrate the policies of Title VII. It also argued that the defendants were not entitled to a defense of good faith reliance upon the EEOC guidelines because (a) their discriminatory employment practices were not authorized by the guidelines and (b) they had not proven actual reliance upon the guidelines. We affirmed, finding that the district court had not clearly erred in finding that the defendants had relied in good faith on both the Illinois statute and the EEOC guidelines and rejecting as unreasonable the EEOC's reading of its guidelines as prohibiting the defendants' practices. 1984 Appellate Opinion, 727 F.2d at 147-48.

The defendants then returned to the district court seeking attorneys' fees for their defense of this lawsuit at both the trial and appellate levels. The district court granted their fee request,[4] and it is from that order that the EEOC now appeals.

II

Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), provides that the trial court may in its discretion allow the prevailing party "a reasonable attorney's fee as part of the costs."[5] A prevailing plaintiff is awarded attorneys' fees unless special circumstances would make the award unjust, but a prevailing defendant will recover fees only upon a showing that "the plaintiff's action was frivolous, unreasonable, or without foundation . . . or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978). The reason for the distinction is that the policies that favor fee awards to prevailing plaintiffs are not in effect in the case of a prevailing defendant. *Id.* at 418; *see also Hamilton v. Daley*, 777 F.2d 1207, 1211-12 (7th Cir. 1985).

The decision whether or not to award attorneys' fees is committed to the discretion of the district judge, *see, e.g., Eichman v. Linden & Sons, Inc.*, 752 F.2d 1246, 1249 (7th Cir. 1985), and never lightly reversed. We hold here,

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[4] The defendants had cross-appealed from the district court's order allowing the EEOC to intervene in this action. Because the EEOC prevailed on this issue, the district court cut down the defendants' estimate of appellate fees by five percent. 1984 District Court Opinion at 7-8.

[5] The EEOC is liable for attorneys' fees the same as any private party. 42 U.S.C. § 2000e-5(k). "[A]lthough a district court may consider distinctions between the Commission and private plaintiffs in determining the reasonableness of the Commission's litigation efforts, we find no grounds for applying a different standard whenever the Commission is the losing plaintiff." *Christiansburg*, 434 U.S. at 423 n.20.

however, that the trial court abused its discretion when it awarded attorneys' fees to the defendants in this case.

III

In its decision on fees, *LeBeau v. Libbey-Owens-Ford Co.*, No. 71-C-1902 (Dec. 17, 1984) (the "1984 District Court Opinion"), the district court relied on our decision in *Reichenberger v. Pritchard*, 660 F.2d 280 (7th Cir. 1981), in ruling on the defendants' application for fees. It relied on four factors that we said were relevant to this inquiry: (1) whether the issue involved in the case was one of first impression requiring judicial resolution; (2) whether the controversy was sufficiently based upon a real threat of injury to the plaintiff; (3) whether the trial court makes a finding that the suit was frivolous under *Christiansburg*; and (4) whether the record will support such a finding.[6] 1984 District Court Opinion at 3 (citing *Reichenberger*, 660 F.2d at 288).

With respect to the first factor, the district court noted that the case was not one of first impression: there had been other cases concerning the impact of Title VII on state protective legislation, one of them an Ohio case involving a LOF plant in Ohio. 1984 District Court Opinion at 3. Second, the district court noted that there was no real threat of injury to the women because the discrimination had ended before the women brought the suit and well before the EEOC had intervened. *Id.* at 3-4. As to the third and fourth factors, the district court found it

[6] We do not wish to create the impression that these "*Reichenberger* factors" create a circuit test for assessing prevailing defendants' claims for attorneys' fees that in any ways differs from the standard articulated by the Supreme Court in *Christiansburg*. Defendant has cited us only one other Seventh Circuit case (and we have found no others) that recites these four factors, *see Munson v. Friske*, 754 F.2d 683, 696-97 (7th Cir. 1985); that case does not apply them as a distinct test. Yet, because this is the framework around which the district judge organized his inquiry, we discuss *Reichenberger* and its factors here.

to be the "apex of unreasonableness" for the EEOC to have brought and maintained this suit in light of its 1965 guidelines, which the court had ruled allowed the defendants to maintain their employment practices in order to comply with state law. *Id.* at 5. We believe that the district court abused its discretion in applying these factors and we do not think that the record supports its characterization of the EEOC's case.

When we stated in *Reichenberger* that it was relevant to consider whether a case was one of first impression, we meant that the novelty of an action might militate against a fee award to a defendant. *See Reichenberger*, 660 F.2d at 288 (plaintiffs contend that their suit is one of first impression); *Christiansburg*, 434 U.S. at 423-24 (same); *see also Tarter v. Raybuck*, 742 F.2d 977, 987 (6th Cir. 1984) (*Reichenberger* stands for proposition that suit being "in an unsettled area of law . . . mitigates [sic] against an award to defendants"), *cert. denied*, 105 S. Ct. 1749 (1985). It is an entirely different matter to consider assessing fees because a suit is not clearly one of first impression. To be sure, we will assess fees when "the plaintiff proceeds in the face of an unambiguous adverse prior ruling," *Bacillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1164 (7th Cir. 1983), but a large number of cases fall between these two extremes, and this case is one.

Raitz v. Libbey-Owens-Ford Co., No. 70-99 (N.D. Ohio 1973), was decided two years before the EEOC intervened in this suit; it dealt with almost identical employment practices at LOF's Toledo, Ohio plant. 1982 District Court Opinion at 20. There, the district court decided that there was no dispute as to any material issue of fact and entered summary judgment for LOF. It framed as the "real issue" of the case "*the intention* of the defendants in continuing those practices after the effective date of [Title VII]," *Raitz*, slip op. at 3 (emphasis supplied); nonetheless, it decided as a matter of law that when the employer is on the "horns of a dilemma" it cannot be charged with

a violation of Title VII, *id.*; *see also* 1984 District Court Opinion at 3.

The district court in this case relied on *Raitz* in holding that the EEOC's suit was frivolous. But, five years earlier, the same court had ruled that the question of the defendants' intent could not be answered as a matter of law. In denying the defendants' motion for summary judgment, the district court explained:

> The question of whether the defendant Libbey-Owens-Ford's—whether that defendant's good faith reliance on the state protective statute is a bar to damages is a question of fact and cannot be decided as a matter of law. While Section 713(b) of Title VII does exempt a defendant employer from liability for monetary damages, it requires that the defendant employer "plead and prove that the act or omission complained of was done or omitted in good faith." 42 U.S.C. Section 2000(e)(12)(b).
>
> In other words, the defendants need to show that they actually acted in good faith. It is not sufficient to establish the existence of the state protective statute to invoke the good faith defense; rather, the defendants would need to show that they in fact knew of and adhered to the requirements of the state protective statute *and that any violation of Title VII was unavoidable and a direct result of their adherence to the state protective statute.*

Hearing on Motion for Summary Judgment (May 23, 1979), Tr. 254-55 (emphasis supplied).

At trial, the district court heard evidence relating to the defendants' good faith defense and also heard evidence presented by the EEOC in an attempt to rebut the defense. In its 1982 opinion, the district court explained that

> [i]n many respects this case and the *Raitz* case in Ohio are related. They were started about the same time. They involved the same employer, L.O.F., and the same employer conduct between July 2, 1965 and Spring

> of 1970 .... They involved similar provisions of state female protective statutes, and in particular provisions preventing overtime employment of females ....

1982 District Court Opinion at 20. It noted, however, that *Raitz* had been dismissed on an early summary judgment motion while this case had become bogged down in a series of procedural and jurisdictional disputes. During the 1970's

> a number of changes had taken place. The 1972 Amendment to the 1964 Act had been enacted making it possible for E.E.O.C. itself to intervene in these actions, reinforcing the affirmative action nature of the equitable relief made available to complaining plaintiffs, and limiting back pay to two years prior to the filing of the charge with E.E.O.C. seeking administrative relief. In addition, a number of sex discrimination cases involving the question about the state-federal law conflict had been decided and concluded, some after appeal to the courts of appeals, and, in several, after certiorari had been denied by the Supreme Court. Incidentally, in none of these cases had back pay been allowed .... The Supreme Court in a race discrimination case, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), had indicated that good faith reliance upon E.E.O.C.'s opinion about these conflicts of law is a defense to back pay .... *Under the circumstances plaintiff-intervenor had a right to demand proof of the good faith of defendant's claim of reliance upon its opinions. This is consistent with the provisions of Title VII as amended.*

1982 District Court Opinion at 21 (emphasis supplied).

Given the district court's acknowledgement both pretrial and in its 1982 opinion that *Raitz* was not dispositive of the issues in this case, we believe that it abused its discretion when it cited the *Raitz* decision as a factor rendering this suit frivolous. As for the collection of cases that appellees cite, and to which the district court adverts to show that this case was not one of first impression,

we can only say that when a trial judge rules that there are facts under which a plaintiff can prevail, it is highly inconsistent for him to later find the suit frivolous because it is foreclosed as a matter of law.[7]

As a second factor in favor of awarding fees to the defendants, the trial court found that there was no "real threat of injury" to the women plaintiffs because the discrimination had ended before they brought their suit. The court did not elaborate on what it meant by this. Certainly we did not mean to imply in *Reichenberger* that there is a distinction between past and prospective injury;[8] damage suits are not by their nature more frivolous than suits for injunctions and we will not assume the district court to have meant this. *Cf. Williams v. General Foods Corp.*, 492 F.2d 399, 406 (7th Cir. 1974) (cessation of discriminatory employment practices is no defense to liability). This abbreviated discussion by the district court might instead be a reference to the fact that none of the plaintiffs complained about LOF's employment practices until after those practices had been changed. The district court had in his 1982 decision found for the women on the question of liability but then denied them backpay on the principle that "the defendants having . . . established that their reliance both on the Illinois Female Employment Statute and the guidelines of E.E.O.C. was in fact

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[7] We do not suggest, as the dissent assumes, that no suit that survives a motion for summary judgment can ever be found frivolous. We do, however, believe that the district court would not have denied the motion for summary judgment if, as in *Raitz*, LOF's state of mind had presented no material question of fact. Since the district court believed in 1979 that LOF's good faith was an open question (on which the EEOC could have prevailed, however unlikely it may have looked), *Raitz* was obviously no impediment to bringing this suit.

[8] In *Reichenberger*, a § 1983 action, we ultimately found that plaintiffs had not suffered an "injury or deprivation of a constitutional magnitude," 660 F.2d at 289, when they sought damages and an injunction on account of an alleged conspiracy to suppress nude dancing in local bars.

in good faith, [they] . . . should not be permitted to reap a financial harvest out of conduct concerning which they never complained until after it was voluntarily discontinued . . . ." 1982 District Court Opinion at 31. Appellees argue that this was a finding by the district court that plaintiffs had not met the burden, discussed in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), of coming forward with evidence that they had either applied for positions from which they were barred or been inhibited from applying by pervasive discrimination. This interpretation would raise the possibility that the women had not really been injured and had merely sought to make a fast buck after the fact.

We do not believe, however, that the district court was relying on *Teamsters* in denying relief.[9] Rather it was recognizing a form of equitable estoppel in denying the women backpay. The district court found for the women on the liability issue: this suggests that it found that they were injured by the defendants' practices. It also found that LOF had relied in good faith on the Illinois statute and EEOC guidelines. If the district court had believed that the women had suffered no cognizable injury, there would have been no need to address the affirmative defenses of good faith reliance. We have held elsewhere that a plaintiff's case that survives a motion for a directed verdict is not a frivolous suit. *Soderbeck v. Burnett County*, 752 F.2d 285, 295 (7th Cir.), *cert. denied*, 105 S. Ct. 2360

[9] It ruled that the plaintiffs had made out their prima facie case and it denied the defendants' motions both for summary judgment and for a directed verdict at the close of the plaintiffs' case. The first mention of *Teamsters* that we find is in the appellee's brief to this court in the merits appeal. In our decision on the merits appeal, we affirmed the district court's equitable denial of backpay, noting that the women's failure to complain "not only affects the equities of the situation, *but it also* means that plaintiffs have not met their burden of proof to show that each was 'a potential victim of unlawful discrimination' . . . . No such showing was made, on any proper view of this record." 1984 Appellate Opinion, 727 F.2d at 150 (emphasis supplied) (quoting *Teamsters*).

(1985). In short, we cannot infer from the district court's 1982 decision a finding that the women had suffered no injury for which they were entitled to sue, and we do not place great weight on the district court's 1984 finding that there was "no real threat of injury" to the plaintiffs.

The third and fourth factors upon which the EEOC relied were whether the suit was frivolous, unreasonable and groundless and whether such a finding is supported by the record. The district court's discussion of those factors was as follows:

> For the EEOC to then join this suit and proceed against the defendants with doubtless unprecedented vigor in light of its own guidelines was, in the opinion of this court, quite unreasonable. As I stated in my ruling of March 31, 1982, "the EEOC in all fairness should not be heard to condemn defendants for having followed its guidelines; and the defendants having further established that their reliance both on the Illinois Female Employment Statute and the guidelines of EEOC was in good faith, the individual plaintiffs should not be permitted to reap a financial harvest out of conduct concerning which they never complained until after it was voluntarily discontinued when EEOC withdrew its approval." In *Equal Employment Opportunity Commission v. Pierce Packing Company*, 699 F.2d 605 (9th Cir. 1982), the EEOC's failure to abide by its own regulations was found in a similar case to be evidence of unreasonableness justifying an award of fees against the EEOC. In that case the court stated:
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> > "The EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness." *Id.* at 609.
>
> I find similarly that for the EEOC to have proceeded with this case in light of its own guidelines was the apex of unreasonableness. The motions of the

> defendants for attorney's fees against the EEOC must be allowed.

1984 District Court Opinion at 4-5.

This assessment of the merit of the EEOC's suit seems to us flawed. The characterization of the EEOC's position is distorted and lacks support in the record and too much reliance is placed on the facts as found at trial to support a finding that the suit should not have been brought. Indeed, the fact that the defendants were put to their proof would seem to weigh in the EEOC's favor.

When the district court denied the defendants' motion for summary judgment,[10] it did so on the grounds that "defendants would need to show that they in fact knew of and adhered to the requirements of the state protective statute and that any violation of Title VII was unavoidable and a direct result of their adherence to the state protective statute." Hearing on Motion for Summary Judgment (May 23, 1979), Tr. 255. In other words, the district court sent this case to trial on the premise that the EEOC was not simply "condemning defendants for having followed its guidelines" but rather was seeking to establish that defendants were using the guidelines as a pretextual justification for their discriminatory practices. The defendants' motions for a directed verdict at the close of the plaintiffs' case was similarly denied on the ground that, the plaintiffs having made out a prima facie case, the defense must be put to its proof on its affirmative defenses. 1982 District Court Opinion at 27 n.5; Tr. 2735.

The district court believed the defendants at trial: "Defendants accepted their burden and produced evidence

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[10] The district court had also denied Local 19's Rule 12(b)(6) motion. Local 19 had asserted that "[a] defendant cannot be liable under Title VII where his actions had a legitimate, nondiscriminatory purpose . . . . This defendant's allegedly discriminatory actions were undertaken to ensure compliance with the Illinois Female Employment Act . . . and were not undertaken with any discriminatory purpose." Motion to Dismiss (Dec. 6, 1978), at 2.

which was not shaken by cross-examination of witnesses or by contradictory evidence, not only that they in fact relied on the published guidelines of the E.E.O.C., but that considering all the circumstances their reliance was in good faith." 1982 District Court Opinion at 22. But *Christiansburg* warns us against "the understandable temptation to engage in post hoc reasoning by concluding that, because the plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." 434 U.S. at 422. Of course, we must also be on the lookout for *post hoc* reasoning on the part of the plaintiff-appellant—that is, a "relitigation" of the suit in an attempt to make it look less frivolous than it was at the time. This is what appellees assert the EEOC is up to here. *See* Appellee LOF's Brief at 43 ("On this appeal, the EEOC has recreated what it now contends was its position during the case . . . ."). And, although a review of the record convinces us that the EEOC did not always manage this case as wisely as it now claims or as one might wish,[11] it also

[11] The appellees call to our attention several instances in which the EEOC asserted an anomolous position during the fifteen-year history of this case. These include the deposition testimony of David Zugschwerdt, EEOC Assistant General Counsel, that Title VII had in 1965 "superseded" state protective legislation, Zugschwerdt Deposition at 72, and the EEOC's response to a Request for Admission of Fact, that the Illinois statute conflicted with Title VII "and was, therefore, void and not enforceable since July 2, 1965." Plaintiff-Intervenor's Responses to Request for Admission of Fact (Jan. 8, 1981), at 7. We also note that the EEOC clung to its allegations of continuing discrimination much too long (until October 1978, three years after intervention) and probably should never have brought them at all.

Yet, the district court did not rely on these as grounds for awarding the defendants fees. Further, even assuming that these were unreasonable actions, it is our duty to review the district court's decision on the EEOC's case as a whole. Other examples cited by the defendants just do not rise to the level of frivolousness. For example, LOF cites to us the fact that the district court commented that "[d]iscovery was extensive, proceeding over a terrain made rugged by severe advocacy and multi-briefed motions." 1982

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shows that it did not bring or conduct this suit in a manner that could be labelled "frivolous" or "unreasonable."

The EEOC's position remained substantially the same throughout the litigation. It sought to show that LOF's employment practices were not mandated by the Illinois statute in that feasible alternatives would have provided women with better opportunities while maintaining compliance with state law. To this end, it attempted to bring out that LOF had exported to Ottawa the same employment classifications developed in Toledo, Tr. 3063-3100, although these classifications had been created to comply with a stricter Ohio protective statute. Tr. 3071. The EEOC also sought to establish that some of the "male" jobs at Ottawa did not require overtime that would have been illegal for women, Tr. 3106-3110, and that alternative ways of organizing the workforce would have allowed women to work in jobs that did require overtime, Tr. 3143-46. It also sought to demonstrate that LOF did not actually rely on EEOC pronouncements in formulating its employment practices—suggesting that LOF did not conscientiously inquire into the relationship between Title VII and state labor law until 1968, when Nancy Raitz brought an EEOC charge against LOF, Tr. 3058-61. The EEOC also tried to bring in evidence to show that LOF stopped the "extra board" system not in reliance upon EEOC's revised guidelines but rather at the behest of the Office of Federal Contract Compliance, Tr. 3125-36. Third, it tried to show that LOF's "good faith" was pretext, eliciting testimony that LOF occasionally worked women over the statutory limit (without paying them overtime wages), Tr. 3528-32; 3874-80, and that LOF never sought to obtain from the State of Illinois an administrative ex-

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[11] *continued*

District Court Opinion at 4. This does not seem damning to us, as the district court did not single out the EEOC as the guilty party—or even hint that any party was guilty. It did criticize the animosity persisting among counsel, *id.*, but laid the blame on both sides.

emption for overtime production work for women, Tr. 3056. Thus, we believe that a review of the record shows that the district court mischaracterized the EEOC's theory of the case as only "condemn[ing] the defendants for having followed its guidelines."[12]

[12] The dissent criticizes our emphasis on what the EEOC "tried to show," asserting that the proper inquiry is into what they actually managed to show. Our point in the preceding passage was, however, merely that the EEOC's theory of the case has remained the same through the litigation and is not the product of *post hoc* rationalization, as LOF charges. The dissent believes that an award of fees is justified because the EEOC proceeded to trial with "no reasonable evidence" that LOF and Local 19 had violated Title VII. The district court, however, awarded fees on the ground that this suit was legally foreclosed by the EEOC's own regulations and the *Raitz* case. Since an award of attorneys' fees is committed to the discretion of the district court, at least under circumstances like those before us, it would be improper to introduce a practice of affirming the exercise of that discretion on grounds that do not appear in the district court's opinion. The district court did not assess the quantity or quality of the EEOC's evidence in its 1984 opinion.

Furthermore, we do not agree with the dissent that the EEOC put on "no reasonable evidence" of a Title VII violation. It is undisputed that the EEOC carried its burden of establishing a *prima facie* case. The burden then shifted to LOF to articulate a defense to liability—here, its good faith reliance on the Illinois statute and the 1965 guidelines. It fell to the EEOC to rebut this defense. It did not succeed, but we believe that it put in *some* evidence tending to show that the asserted "reliance" was merely pretext. The EEOC elicited testimony suggesting that when LOF opened its Ottawa plant it simply imported the "extra board" system from Toledo, where LOF was subject to a more stringent Ohio protective statute. Tr. at 3063-3100. This would suggest that the "extra board" was not a conscious attempt by LOF to comply with the Illinois statute. There was also testimony that suggested that LOF did not endeavor to tailor its operations closely to the requirements of the Illinois statute. Mr. Kramer testified that if some jobs in a department called for overtime the entire department was made a "male" department. This was because of the way that seniority "bumping" rights were set up. Tr. at 3099-3105. Although overtime was voluntary, and often performed by different individuals than had worked the first eight hours at a par-

(Footnote continued on following page)

The district court also ruled that the defendants were entitled to attorneys' fees for defending a frivolous appeal. It wrote:

> The EEOC argued on two grounds that the trial court's decision should be reversed. First, that the 1965 guidelines prohibited the employment practices of Libbey-Owens-Ford and second, that the defendants did not rely in good faith on the 1965 guidelines. For all of the reasons stated earlier, the appeal on these issues was as unreasonable as the pursuit of those issues at trial.

1984 District Court Opinion at 6. On appeal, the EEOC argued first that the district court had incorrectly concluded the "good faith reliance" issue by inquiring whether LOF in fact used these employment practices as a way to comply with the statute instead of asking whether LOF *had to* use these practices to avoid violating the statute. Appellants' Merits Brief at 23-36. In light of this "erroneous" analysis, the EEOC contended, denial of backpay would frustrate the goal and purpose of Title VII, in violation of *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Appellants' Merits Brief at 37-38. It also argued that the defendants had not proved their actual reliance upon the 1965 guidelines. *Id.* at 45-48. Finally, it argued that the 1965 guidelines "did not authorize" defendants' employment practices. *Id.* at 38-44. It framed this last argument as follows:

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[12] *continued*

ticular post, LOF had never considered allowing women to work in these departments but to remove their names from the overtime "bidding" lists. Tr. at 3143-46. In fact between 1965 and 1970 LOF never considered *any* alternative to the extra board system. Tr. 3145-46.

We do not suggest that it was erroneous to discount this testimony in light of other testimony, put on by LOF and Local 19. Nonetheless, it is incorrect to say that the EEOC put on no evidence whatsoever.

> [I]t is clear that the 1965 EEOC guidelines did not condone defendants' employment practices. On the contrary, the guidelines specifically prohibit sex-segregated job categories, seniority lists and lay-off systems. 29 C.F.R. § 1604.2. Thus, LOF and Local 19 were expressly put on notice that their system for employment of women violated Title VII.
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> As regards state protective laws, the guidelines only sanctioned practices which were specifically mandated by state statute . . . . [T]he Illinois Female Employment Act, which only prohibited women from working in excess of a certain number of hours, did not require any of defendants' sex-segregated practices.
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> Moreover, even if the Illinois statute could be construed as requiring the defendants' practices, the guidelines put defendants on notice that such conduct would not be considered lawful. The guidelines specifically state that:
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> . . . where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination.
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> 29 C.F.R. § 1604.1(c). Any law which required an employer to restrict women to only one department, classify jobs as male and female, and maintain sex-segregated seniority and layoff systems would clearly have had the effect of subjecting women to discrimination, rather than protecting them. The guidelines provide that compliance with such state laws would not shelter an employer from a finding of discrimination.

Id. at 42-43 (footnote omitted). This aggressive reading of the 1965 guidelines was rejected first by the district court and then by this court. The district court found that the guidelines meant that "federal law would not be violated by compliance with state law," 1982 District Court Opinion at 16, and that "if an employer's employment pro-

gram for women is mandated by or in furtherance of compliance with the female employment practices of the state, such practices may be continued," *id.* at 29-30. This differed from the EEOC's reading in that it suggested that a practice "in furtherance of" compliance but not "mandated by" state law could nonetheless provide the basis for a bona fide occupational exception. The EEOC argued before us that not all of LOF's practices were "mandated by" state law. Once stripped of that protection, it argued, the practices had to be evaluated under the general proscription of discriminatory employment practices.

We responded to this argument in our merits opinion:

> We believe that the appellants are mistaken when they argue . . . that the 1965 guidelines "specifically prohibit sex-segregated job categories, seniority lists and lay off systems. 29 C.F.R. § 1604.2." So they do, but with an important exception directly following in the cited section: "unless sex is a bona fide occupational qualification for the job." In the preceding section . . . the guidelines state, with reference to laws protecting women: "Accordingly, the Commission will consider limitations or prohibitions imposed by state laws or regulations as a basis for application of the bona fide occupational qualification exception."

1984 Appellate Opinion, 727 F.2d at 148. We then interpreted the guidelines generally to mean that " 'good faith reliance on state female protective laws, such as the Illinois Female Employment Act, constituted a legitimate exception to Title VII . . . .' " *Id.* (quoting *Williams v. General Foods Corp.*, 492 F.2d 399, 402 (7th Cir. 1974)).

But our rejection of the EEOC's arguments does not, without more, make them frivolous. The EEOC's interpretation is within the fair meaning of the words of the guidelines. It is not foreclosed by the Supreme Court's decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), in which the Court noted the existence of "a complete but very narrow" immunity for employers who rely in good faith on EEOC interpretations of Title VII, *id.*

at 423 n.17, and declined to comment on those courts of appeals cases in which backpay had been denied because of an employer's good faith reliance on state protective legislation, *id.* at 423 n.18.[13] Nor is the EEOC's position irreconcilable with this court's decision in *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974).[14] As the EEOC noted in its merits brief to our court, in *Williams*

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[13] Defendants argue that the EEOC took a contradictory view of its own regulation in the *amicus curiae* brief it filed in the Supreme Court in *Albemarle*. In arguing against a "good faith" defense to Title VII race discrimination the EEOC wrote:

> As we understand the application of the "special circumstances" standard to the question of back pay, the Act's policies of making the victims whole and deterring future discrimination requires back pay to be awarded unless, for substantial reasons that are consistent with the purposes of the Act, awarding back pay would be unjust to the employer. One such special circumstance, in the context of employment practices that discriminate on the basis of sex, might be the employer's *reasonable* and *good-faith* reliance upon state female "protective" statutes.

EEOC *Amicus Curiae* Brief at 26, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (emphasis supplied) (citations omitted). The EEOC argued in the case before us that LOF's practices were, in effect, neither reasonable nor in good faith and that thus denying backpay would frustrate the policies of Title VII, as articulated in *Albemarle*. Appellants' Merits Brief at 37-38.

We note in passing that this EEOC position is no less in the spirit of *Albemarle* than Local 19's 1978 contention that lack of discriminatory intent is a defense to back pay. *See* Motion to Dismiss (Dec. 6, 1978), at 1; *supra* note 9.

[14] Nor is this court's decision in *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), a bar. In that race-discrimination case, we rejected the contention that the employer's good faith might be a bar to backpay, noting that the "special factors" preventing an award of backpay are narrowly construed "and usually include only circumstances where state legislation is in conflict with Title VII." *Id.* at 451. The EEOC's argument was that LOF was not faced with such a conflict.

> the only challenged practice was the employer's refusal to schedule [female] employees for early morning 'start-up' overtime since such overtime would violate the Illinois statutory limitation on working hours for women . . . . The primary factor which weighed against backpay in the *Williams* case was that the challenged discriminatory actions were specifically required by the Illinois statute. . . .

Appellants' Merits Brief at 26. General Foods had been, the EEOC concluded, actually on the "horns of a dilemma;" LOF, it argued, had not. Thus, although we rejected the EEOC's appellate position, we do not believe that it was frivolous, unreasonable or without foundation.

IV

For all of the foregoing reasons, we believe that the district court abused its discretion in awarding attorneys' fees to the defendants in this action[15] and thus hold that its 1984 judgment is

REVERSED.

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[15] Defendants have in addition moved this court under Federal Rule of Appellate Procedure 27(a) and 28 U.S.C. § 1927 to award them their attorneys' fees, expenses and costs for this appeal because of "EEOC's serious misrepresentations, omissions and distortions of record in this matter." We decline to do so. Obviously, in light of the result we reach here, we did not find this a frivolous appeal. Further, if the EEOC has at times been less than candid about its position, its performance has been closely matched by that of the appellees.

ESCHBACH, *Senior Circuit Judge*, dissenting. I respectfully dissent. As the majority recognizes, under 42 U.S.C. § 2000e-5(k), "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). " 'A suit is frivolous if it has no reasonable basis, whether in fact or in law.' " *Gekas v. Attorney Registration and Disciplinary Commission*, 793 F.2d 846, 850 (7th Cir. 1986) (per curiam) (quoting *Tarkowski v. County of Lake*, 775 F.2d 173, 176 (7th Cir. 1985)). I agree with the district court that the EEOC's suit was unreasonable on its facts and as a matter of law, and conclude that the district court's award of $190,631 to Libbey-Owens-Ford Co. ("LOF") and $132,877 to Local 19, United Glass and Ceramic Workers ("Local 19") was a proper exercise of its discretion.

I

Until 1969 EEOC regulations provided that "the Commission will consider limitations or prohibitions imposed by . . . state law or regulations as a basis for application of the bona fide occupational qualification exceptions. . . . An employer, accordingly, will not be considered to be engaged in an unlawful employment practice when he refuses to employ a woman in a job in which women are legally prohibited from being employed or which involve [sic] duties which women may not legally be permitted to perform because of hazards reasonably to be apprehended from such employment." 29 C.F.R. § 1604.1(c) (1965), *superseded*, 45 Fed. Reg. 13,367 (1969). Title VII itself recognizes that employment practices "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission" are immune from liability. 42 U.S.C. § 2000e-12(b); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 423 n.17 (1975).

The Illinois Female Employment Act prohibited the employment of women for more than 8 hours a day or

48 hours a week. Ill. Rev. Stat. ch. 48, ¶ 5 (1969); 1909 Ill. Laws 212. In 1970 the statute was adjudged to be preempted by Title VII. *See Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304, 1308 (S.D. Ill. 1970). In our prior opinion on the merits, we explained how LOF complied with the Illinois statute:

> LOF at all times obeyed the Illinois employment laws against overtime for females. Production of glass by its nature requires a certain amount of overtime. This is apparently because some operations require much more time than others; in order to keep production steady, some operations therefore must be continuous while others need not be; this situation is referred to as "balancing." In order to comply with the Act, women employed full-time were assigned by LOF to work in non-continuous operations, where overtime was less frequently required because operations could be stopped or speeded up as necessity dictated. Overtime was avoided in those operations also by hiring part-time women employees, listing them on an "extra board" in order of seniority, and calling them in for work if replacements (for absentees) or extra production were needed. When called in, part-time women employees had an absolute right of refusal and often exercised that right. Full-time women employees were hired in order of seniority from those on the extra board who wanted full-time work. Under this system LOF was able to employ women and, despite the nature of its production, was able at the same time to comply with the Illinois law against overtime for women.

Le Beau v. Libbey-Owens-Ford Co., 727 F.2d 141, 143 (7th Cir. 1984) ("*Le Beau I*").

II

LOF relied upon the EEOC's regulation to establish its immunity from liability under Title VII. After LOF submitted evidence to support its defense under 42 U.S.C.

§ 2000e-12(b), the burden of coming forward with evidence to rebut LOF's defense shifted to the EEOC. *See* Majority Opinion at 18 n.12. To rebut LOF's defense, the EEOC unsuccessfully attempted to show that LOF did not act in good faith in segregating its workforce, that its segregated workforce was not in conformity with the EEOC's guideline, and that it did not rely on the EEOC regulations. In my opinion, the complete absence of any reasonable evidence on the part of the EEOC to support its claims demonstrates that the EEOC could not have reasonably believed that it could rebut LOF's defense. I therefore find its suit frivolous.

A. *LOF's Alleged Bad Faith*

The majority says that the EEOC "tried to show that LOF's 'good faith' was pretext, eliciting testimony that LOF occasionally worked women over the statutory limit (without paying them overtime wages), Tr. 3528-32; 3874-80, and that LOF never sought to obtain from the State of Illinois an administrative exception for overtime production work for women, Tr. 3056." Majority Opinion at 17-18. With all due respect, the only testimony of LOF's "bad faith" the EEOC elicited was that on occasions when LOF had exhausted its "extra board," it rarely scheduled women to work overtime. Tr. 3529 (testimony of Dale Ferguson, Director of Industrial Relations at LOF's Ottawa plant).

At pages 3874 to 3880 of the transcript, to which the majority also refers, counsel for the EEOC asked William Modesitt, Local 19's former plant president, whether, if LOF's records reflected an instance when a woman worked over the statutory limit, he would have known of it. Modesitt answered that he probably would have heard about it.[1] Counsel's questions, of course, are not evidence and

[1] The exact questions and answers were:

Q: And if I told you, sir, that Libbey-Owens-Ford's records reflected on April 10, 1956 a woman named Ms. Clark

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the witness's answers do not establish that a woman actually worked over the statutory limit on even one occasion. Even if the assertions made by counsel for the EEOC are taken as evidence, they add nothing to the testimony that LOF rarely worked women above the statutory limits.

The EEOC regulation quoted above also provided that "[w]here state laws or regulations provide for administrative exceptions, the Commission will expect an employer asserting a bona fide occupational qualification pursuant to this paragraph to have attempted in good faith to obtain an exception from the agency administering the state law or regulation." 29 C.F.R. § 1604.1(c)(3) (1965). As the majority notes, to prove LOF's "bad faith," the EEOC sought to establish that LOF did not apply for an exception under the Illinois statute. Majority Opinion at 17-18. Nevertheless, the EEOC adduced absolutely no evidence that LOF never applied for such an exception to the Illinois Department of Labor, the agency charged by

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[1] *continued*

worked 9½ hours, . . . [w]ould you have been aware of that?

A: I probably heard about it.

Q: And if Libbey-Owens-Ford's records reflected that Helen Dougherty on August 7, 1966 worked that pay period two 8½ hour days, would you have known about that?

. . . .

A: I may have heard about that also.

. . . .

Q: And if Libbey-Owens-Ford's records reflected that in the pay period ending June 26, 1966 a Ms. Eastman worked a 16-hour day, double, would you have known about it?

. . . .

A: I probably heard about that one because that was unusual.

Tr. 3875-78. The probative value of these three alleged incidents, one of which dates to 1956—nine years before the issue of LOF's compliance with Title VII could have arisen—to establish that the EEOC's suit was not frivolous is not apparent to me.

Ill. Rev. Stat. ch. 48, ¶ 7 (1969), with the duty of enforcing the statute. Indeed, Lester Kramer, LOF's Vice-President for Manufacturing Services, testified that LOF asked for an "exemption for a clerical female to work ten hours twice a month, and that was denied." Tr. 3110-11; *see also id.* at 2862; *Le Beau I*, 727 F.2d at 145.[2]

Thus, the sum and substance of the EEOC's evidence of LOF's alleged bad faith is that women rarely worked overtime. Contrary to the majority, I believe that the merit of the EEOC's suit must be judged in light of the evidence that the EEOC reasonably believed it could adduce at trial, not by what the EEOC "attempted to bring out" or "tried to show." Majority Opinion at 17-18. The EEOC's complete absence of any reasonable evidence that would rebut LOF's good faith defense raises a presumption that the EEOC could not reasonably have believed that it could rebut LOF's defense. The EEOC has not explained its lack of evidence to rebut LOF's evidence of good faith. In my view, it, therefore, was patently unreasonable for the EEOC to argue that LOF acted in bad faith on no other evidence than that women rarely worked overtime.[3]

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[2] The portion of the transcript to which the majority refers simply consists of Kramer's testimony that as of 1965 Illinois law allowed exceptions only for emergencies or during wartime. Tr. 3056-57; *see also* Ill. Rev. Stat. ch. 48, ¶¶ 5.1 (exceptions), 8.1 (emergency wartime permits) (1969).

[3] The majority seems to suggest that the merit of the EEOC's suit should not be judged in light of the evidence the EEOC reasonably believed that it could introduce at trial. For example, it criticizes the district court for placing "too much reliance . . . on the facts as found at trial to support a finding that the suit should not have been brought." Majority Opinion at 15. Furthermore, the majority's conclusion that the EEOC's suit was meritorious rests upon its view of what the EEOC "sought to establish" at trial. Majority Opinion at 17-18.

I agree with the majority that we should not adjudge the EEOC's suit frivolous simply because it lost at trial. See Majority Opinion at 16 (quoting *Christiansburg Garment Co.*, 434 U.S. at 422). I

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B. *Conformity with the EEOC's Written Interpretation*

The EEOC argued that its "guidelines specifically prohibit[ed] [LOF's] sex-segregated job categories, seniority lists and lay-off systems." EEOC Merits Brief at 42-43. Indeed, it even maintained that LOF's segregated workforce violated the EEOC's regulation "even if the Illinois statute could be construed as requiring the defendant's practices." *Id.* The EEOC had advanced these arguments in an earlier suit against LOF involving identical employment practices under a similar state statute,[4] and had lost. *Raitz v. Libbey-Owens-Ford Co.*, No. 70-99 (N.D. Ohio Sept. 25, 1973). As the majority acknowledges, a suit is frivolous when "the plaintiff proceeds in the face of an unambiguous adverse previous ruling" or otherwise "is aware with some degree of certainty of the factual or legal infirmity of his claim." *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1163-64 (7th Cir. 1983). After *Raitz*,

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[3] *continued*
nevertheless believe that the merit of the EEOC's suit cannot be measured by the Commission's unfounded expectations of what it hoped to prove, but must be based upon the evidence that the EEOC reasonably believed it could establish at trial. Absent any other explanation (such as the unexpected unavailability of a witness), the absence at trial of any reasonable evidence as to an essential element of a case indicates that the plaintiff could not reasonably have believed that it could establish that element at trial. Since the EEOC has offered no explanation of the discrepancy between what it attempted to show at trial and what it actually established at trial, the absence at trial of any reasonable evidence to support the EEOC's contentions indicates that it could not reasonably have believed that it could establish that LOF violated Title VII.

[4] As the majority notes, Majority Opinion at 17, the Ohio statute at issue in *Raitz* was stricter than that of Illinois in that the Ohio statute not only prohibited the employment of women for more than 8 hours a day and 48 hours a week, but also barred women from any job that required lifting over 25 pounds, that did not receive at least a half-hour lunch break, or that involved the use of an electric truck. Tr. 3071. The EEOC, however, did not demonstrate that LOF's job classifications were any more restrictive than required under Illinois' less exacting statute.

the handwriting was on the wall. The EEOC's defeat put the Commission on notice of the legal infirmity of its claims as early as 1973—two years before it intervened in the instant case. I, therefore, believe that the EEOC's prosecution of this case was unreasonable as a matter of law, and, hence, frivolous.

The majority, however, seeks to discount the EEOC's defeat in *Raitz*. Noting that summary judgment for LOF was granted by the *Raitz* court but denied by the court below, it reasons that the denial of summary judgment means that the EEOC's suit must have been meritorious. *See* Majority Opinion at 10-11. I respectfully disagree.

That a defendant's motion for summary judgment is denied and a case is tried in no way suggests that the plaintiff's suit is not frivolous. Summary judgment, of course, must be denied whenever there is a genuine issue of material fact. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, ____, 106 S. Ct. 2505, ____ (1986). The district court, therefore, simply identifies genuine issues of material fact—it does not decide them. *See Stewart v. RCA Corp.*, 790 F.2d 624, 629-30 (7th Cir. 1986). Thus, a district court's determination that there is a genuine issue of material fact means only that the evidence is disputed. It does not mean that the evidence does not overwhelmingly favor the movant for the reason that the district court, in deciding whether to grant summary judgment, does not weigh the opposing evidence.[5]

[5] For example, the critical issue in employment discrimination suits often is the defendant's intent. *See Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 513 (7th Cir. 1986). "Thus, the credibility of witnesses is often decisive." *Id.* Because the credibility of witnesses is crucial, a plaintiff can make out a genuine issue of material fact simply by offering proof that "casts doubt upon the veracity of the employer's stated reason for its action." *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 98 (7th Cir. 1985)

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I, therefore, disagree with the majority when it "say[s] that when a trial judge rules that there are facts under which a plaintiff can prevail, it is highly inconsistent for him to later find the suit frivolous because it is foreclosed as a matter of law." Majority Opinion at 12. To the contrary, it is perfectly consistent for a district court to deny summary judgment and, after trying the case, hold that the plaintiff's suit is frivolous.[6] Indeed, any number of courts have permitted cases to go to trial that they later have found to be frivolous. *See, e.g., Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983) (finding suit frivolous after dismissing suit at close of plaintiff's case); *Coleman v. General Motors Corp.*, 667 F.2d 704 (8th Cir. 1981) (finding suit frivolous after 11-day bench trial); *Harris v. Plastics Manufacturing Co.*, 617 F.2d 438 (5th Cir. 1980) (finding suit frivolous after granting motion to dismiss under Fed. R. Civ. P. 41(b) at close of plaintiff's case); *Carrion v. Yeshiva University*, 535 F.2d 722 (2d Cir. 1976) (finding suit frivolous after dismissing it at close of plaintiff's case); *Piljan v. Michigan Department of Social Services*, 585 F. Supp. 1579 (E.D. Mich. 1984) (finding suit frivolous after 8 years of litigation and dismissal at close of plaintiff's case pursuant to Fed. R. Civ. P. 41(b)); *Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp.

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[5] *continued*
(citing *Herman v. National Broadcasting Co.*, 744 F.2d 604, 610 (7th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1393 (1985)). Thus, whenever a case turns on the credibility of a witness's testimony as to the defendant's intent, the suit will survive summary judgment and go to trial, regardless of the weight of the evidence in the defendant's favor.

[6] By way of illustration, a plaintiff in an employment discrimination case might prevail if his testimony as to the defendant's discriminatory intent is credited, while the defendant's testimony as to its lack of any discriminatory intent is discredited. However, the evidence may overwhelmingly indicate that the plaintiff's testimony is not to be believed. In such a case, the trial judge can rule that there are facts under which the plaintiff could prevail at trial, *i.e.*, the plaintiff's story might be believed, and consistently find that the suit was frivolous.

421 (S.D.N.Y. 1984) (finding suit frivolous after trial); *Lacy v. General Electric Co.*, 558 F. Supp. 277 (E.D. Pa. 1982) (finding suit frivolous after trial), *aff'd*, 786 F.2d 1147 (3d Cir. 1986); *Brisbane v. Port Authority of New York & New Jersey*, 550 F. Supp. 222 (S.D.N.Y. 1982) (finding suit frivolous after 6-day trial); *Hill v. BASF Wyandotte Corp.*, 547 F. Supp. 348 (E.D. Mich. 1982) (finding suit frivolous after 9-day bench trial); *Colucci v. New York Times Co.*, 533 F. Supp. 1011 (S.D.N.Y. 1982) (finding suit frivolous after trial); *Dailey v. District* 65, *UAW*, 505 F. Supp. 1109 (S.D.N.Y. 1981) (finding suit frivolous after bench trial); *Flora v. Moore*, 461 F. Supp. 1104 (N.D. Miss. 1978) (finding suit frivolous after 5-day trial), *aff'd*, 40 Fair Empl. Prac. Cas. (BNA) 856, 24 Empl. Prac. Dec. (CCH) ¶ 31,481 (5th Cir. 1980); *Sierra v. Datapoint Corp.*, 459 F. Supp. 668 (W.D. Tex. 1978) (finding suit frivolous after trial); *Reed v. Sisters of Charity of the Incarnate Word of Louisiania, Inc.*, 447 F. Supp. 309 (W.D. La. 1978) (finding suit frivolous after granting dismissal at close of plaintiff's case pursuant to Fed. R. Civ. P. 41(b)); *Equal Employment Opportunity Commission v. Kip's Big Boy*, 424 F. Supp. 500 (N.D. Tex. 1977) (finding EEOC's suit frivolous after trial); *Sek v. Bethlehem Steel Corp.*, 421 F. Supp. 983 (E.D. Pa. 1976) (finding suit frivolous after trial), *aff'd*, 565 F.2d 153 (3d Cir. 1977), *cert. denied*, 436 U.S. 920 (1978); *Equal Employment Opportunity Commission v. Service Container Corp.*, 418 F. Supp. 898 (W.D. Okla. 1976) (finding EEOC's suit frivolous after trial).[7]

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[7] In *Soderbeck v. Burnett County*, 752 F.2d 285, 295 (7th Cir.), *cert. denied*, ___ U.S. ___, 105 S. Ct. 2360 (1985), cited by the majority, we stated that "[s]ince the plaintiff succeeded in making out a prima facie case against these defendants, that is, a case strong enough to withstand a motion for directed verdict (incorrectly granted by the district judge), the case against them was not frivolous." In that case, the district court directed verdicts at the close of plaintiff's case in favor of three of the five defendants. The jury then returned verdicts against the two remaining defendants. On appeal, we affirmed the judgment against one of the defendants and reversed the directed verdicts in favor of

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In this case, the district court's opinion denying the defendant's motions for summary judgment, upon which the majority relies, is simply a 2-page transcript of the court's decision from the bench.[8] As an examination of the court's oral opinion makes clear,[9] the district court

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[7] *continued*
the three defendants. (We also reversed the judgment against the other defendant for a reason not relevant to this case). We reversed the award of attorney's fees to the three defendants because, having lost on appeal, they were not prevailing parties. In addition, the plaintiff's case, which was strong enough to win judgment against one of the defendants, clearly was not frivolous. Our passing statement that the plaintiff's case was not frivolous because it was strong enough to withstand a motion for directed verdict thus was unnecessary to our decision, and cannot dictate the disposition of this appeal.

[8] In contrast, the trial transcript consists of 4493 pages.

[9] The district court's complete discussion of defendants' motions for summary judgment consists of the following:

> Defendants argue also, assuming arguendo liability on their part, that plaintiffs are entitled to no remedy under Title VII as a matter of law due to the defendants' good faith reliance on the Illinois Female Protection Statute. Specifically, the defendants refer to the tension that existed between the federal law, which aimed at insuring equality of sexes in employment opportunities, and the state law which was designed to prohibit the employment of women beyond a specified number of hours per day and per week.
>
> The question of whether the defendant Libbey-Owens-Ford's—whether that defendant's good faith reliance on the state protective statute is a bar to damages is a question of fact and cannot be decided as a matter of law. While Section 713(b) of Title VII does exempt a defendant employer who was acting in good faith from liability for monetary damages, it requires that the defendant employer "plead and prove that the act or omission complained of was done or omitted in good faith." 42 USC Section 2000(e)(12)(b).
>
> In other words, the defendants need to show that they actually acted in good faith. It is not sufficient to establish the existence of the state protective statute to invoke the good faith defense; rather, the defendants would need to show that they in fact knew of and adhered to the requirements of the

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merely ruled that the issue of LOF's good faith is a question of fact, rather than one of law. Because it did not consider the parties' evidence, the district court's opinion does not suggest that the EEOC's suit was not frivolous. As another district court explained in a similar case:

> This was clearly one of the most frivolous employment discrimination actions ever brought. The fact that it survived a summary judgment motion merely indicates that at the time that motion was brought, though the case seemed very weak, there did appear to be genuine issues of fact sufficient, under the strict standards of this circuit, to warrant denial of the motion.

Steinberg, 583 F. Supp. at 424.

In addition to relying on the district court's denial of summary judgment, the majority points to three pieces of evidence that it believes support the EEOC's argument that LOF's employment practices were not in conformity with the EEOC's regulation: first, the EEOC "attempted to bring out that LOF had exported to Ottawa the same employment classifications developed in Toledo, Tr. 3065-3100, although these classifications had been created to comply with a stricter Ohio protective statute"; second, the EEOC "also sought to establish that some of the 'male' jobs at Ottawa did not require overtime that would have been illegal for women, Tr. 3106-3110"; and third, the EEOC sought to demonstrate "that alternative ways of organizing the workforce would have allowed women

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[9] *continued*

state protective statute and that any violation of Title VII was unavoidable and a direct result of their adherence to the state protective statute.

Wherefore, for the foregoing reasons, the companion motions for summary judgment of the defendant Libbey-Owens-Ford and of the defendant Local 19 should be, and the same hereby are, denied.

Tr. of Hearing on Motion for Summary Judgment 254-55 (May 23, 1979).

to work in jobs that did require overtime, Tr. 3143-46." Majority Opinion at 17. My review of the record persuades me, however, that, whatever the EEOC hoped to prove, it adduced no evidence that a single job from which women were excluded did not require overtime in violation of Illinois law.[10] Moreover, the EEOC introduced no evidence that alternative methods of organizing the workforce would have been possible or feasible given the recurrent overtime imposed by the glass manufacturing process.[11] The absence of any such evidence is fatal to the EEOC's claim that LOF's segregated workforce was not in conformity with the EEOC's guideline. I thus believe that it was unreasonable for the EEOC to argue that LOF did not conform to the Commission's regulation given its lack of evidence essential to rebut LOF's defense of compliance with the EEOC's regulation.

C. *Reliance on the EEOC's Regulation*

The majority states that the EEOC "sought to demonstrate that LOF did not actually rely on EEOC pronouncements in formulating its employment practices—suggesting that LOF did not conscientiously inquire into the relationship between Title VII and state law until 1968, when Nancy Raitz brought an EEOC charge against LOF, Tr.

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[10] That portion of the transcript to which the majority refers, Tr. 3065-3100, 3106-3110, establishes that women were excluded from certain jobs at the Toledo plant that required lifting of more than 25 pounds of materials and from certain jobs in the Plastic and Assembly Departments at the Ottawa plant that required daily overtime for clean-up. The record, however, does not establish that any of the jobs from which women were excluded did not require overtime in violation of Illinois law. *See* Tr. 3104.

[11] That portion of the transcript that the majority cites, Tr. 3143-46, establishes only that from July 1965 until March 1970 LOF did not consider alternative methods of organizing its workforce. As the district judge noted, Tr. 3145, the evidence does not establish that any alternative was possible or economical. Indeed, LOF adduced testimony that the alternatives proposed by the EEOC were uneconomical or unworkable. *See* Tr. 3186-87.

3058-61." Majority Opinion at 17. That portion of the record to which the majority refers, however, establishes only that LOF did not perform an internal review of the contracts in effect at its plants prior to July 2, 1965, and that LOF did not have occasion again to consider LOF's practices with regard to the EEOC's guidelines until Nancy Raitz brought a charge before the EEOC in March 1968. Against this must be weighed evidence that we and the district court characterized as "overwhelming" evidence that LOF relied upon the EEOC's regulation.[12] *Le Beau I*, 727 F.2d at 148-49. Given the weight of evidence that LOF was aware of and sought to comply with the EEOC's regulation, I find the EEOC's argument that LOF did not rely on its guidelines unreasonable on the facts.[13]

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[12] For example, LOF officers became familiar with Title VII "almost as soon as it was passed." Tr. 2890. On June 25, 1965, before the EEOC even issued its guidelines, LOF circulated a memorandum to its plant managers declaring that the company would comply with Title VII, but would have to proceed cautiously until some guidelines were established. *See Le Beau I*, 727 F.2d at 148; *see also* Tr. 3195-97. In November, 1965, after the EEOC issued its guidelines, LOF distributed copies of the regulations to its officers. Tr. 2896-97.

[13] In a footnote, the majority states that the EEOC "put in *some* evidence tending to show that the asserted 'reliance' was merely pretext." Majority Opinion at 18 n.12 (emphasis in original). The evidence to which the majority refers is testimony that LOF imported the "extra board" system from its Ohio plant and that LOF did not consider permitting women to work overtime in departments other than the plastics and assembly departments. I have already addressed the former point. *See* Dissent at 29 n.4.

As for the latter point, I respectfully believe that the majority misunderstands the testimony as to how overtime was scheduled. There were two types of overtime at LOF's Ottawa plant: the first was daily overtime, *i.e.*, working over 8 hours in one day, and the second was weekend overtime, that is, working on Saturday or Sunday. Tr. 2835. Weekend overtime, which was required to "balance" production, Tr. 2838, 4341-42, 4409-10, was voluntary. Tr. 3114, 4333-34, 4424-25. In addition to weekend overtime, however, particular jobs also required daily overtime. Rather than

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The majority also states that "[s]ince an award of attorneys' fees is committed to the discretion of the district court, . . . it would be improper to introduce a practice of affirming the exercise of that discretion on grounds that do not appear in the district court's decision." Majority Opinion at 18 n.12. With minor qualifications,[14] I concur.

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[13] *continued*
being voluntary, daily overtime was involuntary in the sense that men who "took certain jobs . . . knew when they took the job that the overtime was required, [and] that they would have to work overtime." Tr. 2851; *see also* Tr. 2836, 3084, 3142-44.

Moreover, there would be occasions—perhaps one to six times a year—when LOF, in response to high demand, would schedule the plant to work six days in one week. *See* Tr. 4420-23. In contrast to weekend overtime required to balance production, overtime on these scheduled days was not voluntary. *See* Tr. 4421. Furthermore, the system of "split shifts" (in which two employees would split the shift of an absent worker so that the employee on the earlier shift would work 4 hours longer and the employee on the later shift would come in 4 hours earlier) was used extensively in three-shift departments when the labor pool could not supply replacements for absent workers. *See* Tr. 2816-17, 3187.

The evidence thus establishes that LOF did not employ women in departments other than plastics and assembly because overtime was required for particular jobs, scheduled days, and split shifts. These reasons clearly were proper reasons under Illinois law and the EEOC guidelines for excluding women from jobs outside the plastics and assembly departments. Thus, that the EEOC adduced evidence that LOF did not consider employing women in the other departments for only 8 hours a day does not change my conclusion that the EEOC could not reasonably have believed that it could rebut LOF's defense.

[14] It surely would be proper to affirm a discretionary decision on a ground that did not appear in the district court's opinion if we conclude, on the basis of the overwhelming evidence in the record before us, that the contrary decision would have been an abuse of discretion. Moreover, the record as a whole often makes clear that the district judge implicitly considered matters that might not appear expressly in the district court's opinion. *See Kirchoff v. Flynn*, 786 F.2d 320, 328-31 (7th Cir. 1986) (Eschbach, J., dissenting). It is proper to affirm the district court's decision so long as we conclude that the district court relied upon the ground on which we affirm.

The majority further states that we should not affirm the fee award because "[t]he district court did not assess the quantity or quality of the EEOC's evidence." *Id.* If I thought that this were the case, I would agree; however, I believe that the district judge clearly took into account the EEOC's evidence, or rather the lack of evidence, when he awarded fees. It should be remembered that the district judge presided over this case since it was assigned to him in 1974, and that he was intimately familiar with the facts. He already had discussed the parties' evidence in detail in his opinion on the merits. *See Le Beau v. Libbey-Owens-Ford Co.*, No. 71 C 1902 (N.D. Ill. Mar. 31, 1982). It is evident from the district judge's reference in his opinion awarding fees to his opinion on the merits that he was well aware of the relevant considerations. To the extent that the majority suggests that the district judge should have repeated findings of fact that he already had made or should have made more detailed findings than were contained in his thorough opinion on the merits, they invite district courts to engage in rituals that exalt form over substance. *See Kirchoff v. Flynn*, 786 F.2d 320, 331 (7th Cir. 1986) (Eschbach, J., dissenting from reversal of fee award).

With all due respect for my colleagues, if my brethren believe that the district judge has not assessed the quality or quantity of the EEOC's evidence, then they should remand this case to the district court for further consideration of the merit or frivolity of the EEOC's suit. *See, e.g., Kirchoff*, 786 F.2d at 328 (majority opinion). By declining to remand this case, they make themselves a discretionary decision which should be made in the first instance by the judge most familiar with this litigation.

III

When the EEOC intervened in this case in 1975, four years after suit was filed, it had no reasonable evidence that LOF and Local 19 had violated Title VII. After six years of discovery and a lengthy trial, it still has no

reasonable evidence that the defendants violated Title VII. The EEOC has offered no explanation of its lack of any reasonable evidence in support of its theory of the case. This absence of evidence at trial is the best indication that the EEOC could not reasonably have believed that it could rebut LOF's and Local 19's defense of good faith reliance on and conformity with the EEOC's guideline, and, therefore, that its suit was frivolous. The Commission's intervention in and continued prosecution of this case was not only frivolous, unreasonable, and without foundation, but also approaches bad faith.[15] I therefore would affirm the district court's award of attorney's fees to LOF and Local 19.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[15] For example, until it was finally forced to abandon its claim in 1978, the EEOC alleged that LOF continued to discriminate against women. Moreover, as late as early 1981—only 9 months before trial—the EEOC maintained that, since state law conflicted with Title VII, the Illinois Female Employment Act was "void and not enforceable since July 2, 1965." Plaintiff-Intervenor's Response to Request for Admission of Fact, at 7 (Jan. 8, 1981). Assertions such as these that are clearly contrary to the facts and the law suggest that the EEOC acted in subjective bad faith.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LORRAINE LE BEAU, et al.,
Plaintiffs,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor

vs.

LIBBEY-OWENS-FORD COMPANY, an Ohio Corporation,

and

LOCAL 19, UNITED GLASS AND CERAMIC WORKERS,
Defendants.

No. 71 C 1902

MEMORANDUM OPINION AND ORDER

This case involved charges of sex discrimination originally brought against the defendant company and the local of its labor union by their women employees (Title VII of the Civil Rights Act of 1964), (42 U.S.C. § 2000e *et seq.*) The suit was filed in August of 1971. Later, in June of 1975, the EEOC was granted leave to intervene as a plaintiff, and took over the management of the case for the women. Eventually in 1981, and after a severely embattled six-week trial, judgment was entered in favor of the defendants and against EEOC on all issues. As to the individual plaintiffs, judgment was entered in their favor on an issue of liability but they were denied any back wages or damages. On appeal the Seventh Circuit affirmed.

The case is now back before the court on the matter of attorneys fees for the defendants. Section 706 (k) of Title VII provides:

> "In an action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as

> part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

The language of this section does not distinguish between prevailing plaintiffs and prevailing defendants. The Supreme Court, however, has construed the provision to mean that attorney's fees may awarded to a prevailing defendant upon a finding that the plaintiff's action was "frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 422 (1978). Therefore, the defendants in this case must first establish that they prevailed and second that the action of the EEOC was frivolous, unreasonable, or groundless.

The defendants here seek fees against the EEOC but not against the individual women plaintiffs. As against the EEOC it is clear that the defendants prevailed on all issues. The argument of the EEOC that it should be treated as one and the same along with the individual plaintiffs is of no merit under the facts of the case.

The principal question for the defendants is whether the suit by the EEOC was frivolous, unreasonable or groundless. In *Reichenberger v. Prichard*, 660 F. 2d 280 (7th Cir. 1981), the Seventh Circuit enumerated several factors to be considered with regard to this issue.

1. Whether the issue involved in the case was one of first impression requiring judicial resolution.
2. Whether the controversy was sufficiently based upon a real threat of injury to the plaintiff,
3. Whether the trial court makes a finding that the suit was frivolous under the *Christianburg* guidelines; and
4. Whether the record will support such a finding. 660 F. 2d at 288.

For the EEOC this case clearly was not one of first impres-

sion. Other cases had litigated the issue of state law interaction with Title VII. One such case had involved this very defendant, Libbey-Owens-Ford and the matter of state laws regulating working hours for women. In that case, *Raitz v. Libbey-Owens-Ford Glass Co.*, No. 70-99 (N.D. Ohio, Sept. 23, 1973), Judge Young of the Northern District of Ohio ruled that as a matter of law where an unresolved conflict between state and federal statutes had been interpreted by EEOC favorably to the state statute, and the employer had been placed "upon the horns of a dilemma", he could not be charged with having violated federal law.

With regard to the second *Reichenberger* factor, here there was no real threat because any discriminatory practices regarding women employees of Libby-Owens-Ford had ceased in March of 1970, twelve years before trial and five years before the EEOC's intervention.

The third and fourth factors involve a finding of whether the suit was frivolous, unreasonable or groundless and, of course, this finding cannot be made unless it is supported by the record. Title VII became effective on July 2, 1965, and the system under which Libbey-Owens-Ford had treated its women employees in order to comply with the State Female Employment Acts became suspect. The EEOC issued guidelines in November of 1965. These guidelines stated:

> "Probably the most difficult area considered in these guidelines is the relation of Title VII to state legislation designed originally to protect women workers. The Commission cannot assume that Congress intended to strike down such legislation."

The guidelines further stated in § 1604.2 (c):

> (c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limita-

> tions or prohibitions imposed by state laws or regulations as a basis for application of the bona fide occupational qualification exception.

For the EEOC to then join this suit and proceed against the defendants with doubtless unprecedented vigor in light of its own guidelines was, in the opinion of this court, quite unreasonable. As I stated in my ruling of March 31, 1982, "the EEOC in all fairness should not be heard to condemn defendants for having followed its guidelines; and the defendants having further established that their reliance both on the Illinois Female Employment Statute and the guidelines of EEOC was in good faith, the individual plaintiffs should not be permitted to reap a financial harvest out of conduct concerning which they never complained until after it was voluntarily discontinued when EEOC withdrew its approval." In *Equal Employment Opportunity Commission v. Pierce Packing Company*, 699 F. 2d 605 (9th Cir. 1982), the EEOC's failure to abide by its own regulations was found in a similar case to be evidence of unreasonableness justifying an award of fees against the EEOC. In that case the court stated:

> "The EEOC's obvious disregard for such promulgated regulations is the apex of unreasonableness." *Id.* at 609.

I find similarly that for the EEOC to have proceeded with this case in light of its own guidelines was the apex of unreasonableness. The motions of the defendants for attorney's fees against the EEOC must be allowed.

The *Christianburg* standard applies to an award of both trial and appellate attorney's fees for the prevailing defendant. *Bugg v. International Union of Allied Industrial Workers of America, Local 507 AFL-CIO*, 674 F. 2d 595 (7th Cir. 1982). While the Appellate Court is empowered to make an award of appellate attorney's fees in a Title VII case, Section 2000e-5 (k) does not specify to which court a petition for fees should be directed. The Seventh Circuit in the *Bugg* case did not require that fees for appellate

work be sought only from the appellate court. Rather, the court said "there appears to be no reason to impose a trial-appellate distinction in this scheme." *Id.* at 600.

Here, it is especially appropriate to seek appellate fees before the trial court. The question of whether the defendants are entitled to fees was pending before this court awaiting the resolution of the appeal. It is simply a matter of judicial economy to deal with the issues of entitlement and computation of both trial and appellate fees in one proceeding.

The EEOC argued on two grounds that the trial court's decision should be reversed. First, that the 1965 guidelines prohibited the employment practices of Libbey-Owens-Ford and second, that the defendants did not rely in good faith on the 1965 guidelines. For all of the reasons stated earlier, the appeal on these issues was as unreasonable as the pursuit of these issues at the trial court level. Therefore, defendants must be allowed fees for this part of the appeal.

The defendants also cross-appealed on the issue of whether the EEOC should have been permitted to intervene in 1975. While the Seventh Circuit spent only one page of its 20 page opinion on this matter, the fact remains that the defendants did not prevail on their cross-appeal; therefore, the award to the defendants must be reduced accordingly.

To get a rough idea of the reasonableness of the defendants' requests, I scrutinized the 66 page docket sheet. I found that from June of 1975, when the EEOC entered the case until now the defendants attorneys have spent a minimum of 175 hours in court. This figure represents over nine years of litigation and includes nearly six weeks of trial, for which I allotted a modest five hours per day. If this time were computed at $100 per hour, the result, on court appearances alone, would equal $175,000. Looking at defendant's requests in this light, I find them to be remarkably reasonable. Both Libbey-Owens-Ford and Local 19

have provided this court with figures which represent the actual fees billed for the hours claimed. In the case of Local 19, copies of the actual bills to the client were submitted. Both defendants should be commended for their open and honest approach. This strong evidence of the value of the work performed serves to take the guess work out of the computation.

Normally, in a case of this nature the prevailing party must separate out the issues on which it did not prevail. At the trial level, the defendants prevailed as against the EEOC on all issues so this step is by-passed. On the appellate level, they did not prevail on their cross-appeal, and I will reduce their award accordingly. According to the affidavit of Mr. Charles Griffin, the attorney responsible for determining the amount to be billed to Libbey-Owens-Ford, time was not included for attorneys to familiarize themselves with the litigation, for work on motions not prevailed on, for routine procedural matters or for a number of inner office strategy conferences. Mr. Griffin also states that in recognizing that the defendant seeks fees against a public agency, he has eliminated paralegal time which was not directly related to the trial or the preparation of the appellate brief. Having carefuly reviewed the hours presented, I am satisfied that this is true. The entries are clear and reasonable and the final figure requested by Libbey-Owens-Ford, $190,631 is fair and reasonable for the very long and hard-fought battle. Because of the reasonable nature of this figure, it should be allowed but reduced by five percent to $181,100 for the failure of Libbey-Owens-Ford to prevail on their cross-appeal.

The fee request presented by Local 19 was also exceptionally reasonable, asking for $139,870.88 in fees. The billing explanations, like those of Libbey-Owens-Ford, are clear and carefully documented. I find this request to be fair and reasonable and find that it should be granted after a reduction of five percent for the cross-appeal. Local 19

should be awarded $132,877 in attorneys fees.

On the issue of whether these fees should be enhanced to reflect current rates, I find that because these fees are awarded against a public agency and the award will ultimately be paid by the taxpayers, no enhancement should be allowed.

In summary, the motion of defendant Libbey-Owens-Ford for attorney's fees is granted in the amount of $181,100. The motion of defendant Local 19 is granted in the amount of $132,877. Pursuant to the statute, 42 U.S.C. 2000e-5(k), these fees are allowed "as part of the costs".

ENTER:

JAMES B. PARSONS
United States District Court Judge

DATED: December 17, 1984

C-8

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable James B. Parsons
Cause No. 71 C 1902 Date: December 19, 1984
Title of Cause E.E.O.C. v. Libbey-Owens Ford Co.
Brief Statement of Motion Amendment

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Adresses of other counsel entitled to notice and names of parties they represent.

Reserve space below for notations by minute clerk

The memorandum opinion dated December 17, 1984 is amended to correct a typographical error as follows: The first complete sentence on page 7 should read, "If this time were computed at $100 per hour, the result, on court appearances alone, would equal 17,500.00"

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-1858, 82-1868, 82-1932, 82-1933

LORRAINE LE BEAU, et al., and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellants,

v.

LIBBEY-OWENS-FORD COMPANY, and LOCAL 19, UNITED GLASS AND CERAMIC WORKERS,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 1902—James B. Parsons, *Judge.*

ARGUED MAY 24, 1983—DECIDED FEBRUARY 3, 1984

Before CUMMINGS, *Chief Judge,* ESCHBACH, *Circuit Judge,* and WYATT, *Senior District Judge.**

WYATT, *Senior District Judge.* These are four appeals in an action for claimed sex discrimination brought by women employees under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e and following).

One appeal (82-1868) is by plaintiff Le Beau and other individual women plaintiffs and by plaintiff Moriarity as

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* The Honorable Inzer B. Wyatt, Senior District Judge of the Southern District of New York, is sitting by designation.

representative of a class of women plaintiffs. Another appeal (82-1858) is by plaintiff-intervenor Equal Employment Opportunity Commission ("EEOC"). These two appeals are from the final judgment of the District Court. A third appeal (82-1932) is by defendant Libbey-Owens-Ford Company ("LOF"). The fourth appeal (82-1933) is by defendant Local 19, United Glass and Ceramic Workers ("Local 19"). These last two appeals are, according to the notices of appeal, simply from the final judgment of the District Court. It is explained in the briefs, however, that these two appeals are really cross-appeals which seek review of an order of the District Court, filed June 27, 1975, granting a motion by EEOC for leave to intervene as a plaintiff.

The action was brought by Le Beau and other female employees of LOF at its two plants in Ottawa, Illinois. The defendants were LOF, Local 19, and United Glass and Ceramic Workers of North America AFL-CIO-CLC (the "International Union") with which Local 19 was affiliated. The claim was that defendants had violated Title VII by discriminating against plaintiffs in that women at the Ottawa, Illinois plants of LOF were, by agreements with, or acquiescence of, the Unions, restricted to employment within two departments, were placed on sex-segregated seniority lists, and were subject to a separate system of assignment, lay-off, and recall. Plaintiffs sought injunctive relief and back pay.

The complaint was dismissed as against the International Union by order filed June 30, 1972. The dismissal was affirmed by this Court on July 17, 1973, on the ground that the International Union had not been named in the charge filed with EEOC (484 F.2d 798).

By order filed June 27, 1975, EEOC was granted leave by the District Court to intervene in the action as a plaintiff.

As an equity case, there was a trial without a jury before the District Court (Parsons, District Judge) between October 6 and November 11, 1981. The District

Court filed its memorandum opinion and order on April 6, 1982 (the memorandum opinion and order was dated March 31, 1982). The District Court found for the individual plaintiffs and the class on the issue of liability but found for defendants "on the question of back wages", denying any back wages. The District Court found "in favor of the defendants and against the E.E.O.C. on all issues". A judgment, separate from the order and opinion, was filed and entered on April 6, 1982. There followed these appeals, of which this Court has jurisdiction under 28 U.S.C. § 1291.

On the appeal of plaintiffs and a class representative and on the appeal of EEOC, we affirm the judgment below.

On the appeals (cross-appeals) of LOF and Local 19, we affirm the order of the District Court, filed June 27, 1975, granting a motion by EEOC for leave to intervene as a plaintiff.

1.

Some of the relevant facts, as shown by the evidence and by the District Court's findings, may be related in chronological order.

Beginning in 1909, Illinois had in force a law, usually called the Illinois Female Employment Act (Ill. Rev. Stat., ch. 48, § 5 and following; "the Act"). This provided that women could not be employed in work such as that of LOF at Ottawa for more than eight hours in any one day nor more than forty-eight hours in any one week. The Act had criminal penalties and was (except in wartime) enforced.

LOF, shortly after 1930, began making glass for automobiles at its two plants in Ottawa, Illinois.

Beginning in 1935, Local 19 and its International Union were the bargaining representatives of the production workers (both male and female) at Ottawa.

From the first, LOF employed women at Ottawa in its production activities (with which this action is solely concerned), as well as in clerical and other traditional "white collar" work. But LOF at all times obeyed the Illinois employment laws against overtime for females. Production of glass by its nature requires a certain amount of overtime. This is apparently because some operations require much more time than others; in order to keep production steady, some operations therefore must be continuous while others need not be; this situation is referred to as "balancing". In order to comply with the Act, women employed full-time were assigned by LOF to work in non-continuous operations, where overtime was less frequently required because operations could be stopped or speeded up as necessity dictated. Overtime was avoided in those operations also by hiring part-time women employees, listing them on an "extra board" in order of seniority, and calling them in for work if replacements (for absentees) or extra production were needed. When called in, part-time women employees had an absolute right of refusal and often exercised that right. Full-time women employees were hired in order of seniority from those on the extra board who wanted full-time work. Under this system LOF was able to employ women and, despite the nature of its production, was able at the same time to comply with the Illinois law against overtime for women. As will appear, the women themselves liked the system and not all of them wanted full-time jobs.

During World War II, while the men served military duty, glass production at LOF Ottawa ceased and production turned to aircraft defense materiel. The Act was suspended by the Illinois legislature in 1937, women moved to all production operations at LOF Ottawa, and the extra board system was discontinued.

After World War II and the return of the men from military duty, LOF Ottawa resumed the making of automobile glass. The non-continuous operations were concentrated in the Plastics and the Assembly Departments. The women were transferred and thereafter assigned only to

these two departments, this in order to comply with the Illinois Female Employment Act which entered again into force. The pre-war extra board procedure for part-time women employees was resumed.

The restriction of women to the two described departments, the use of women for part-time work, and the extra board system as a whole were means of employing women at LOF without violating the Illinois laws against overtime for women. There was testimony (T 3186-87; "T" references are to pages of the trial transcript) that the system was costly to LOF, in part at least because LOF was required to pay fringe benefits for the many women workers who were not full-time. The labor unions approved, acquiesced in, and agreed to the extra board system as followed by LOF.

Title VII became effective on July 2, 1965 and the extra board system at LOF Ottawa, treating women differently from men because of the Illinois Act against overtime for women, became suspect.

LOF was completely aware of Title VII and of its possible effect on sex discrimination in states with conflicting requirements. These conflicts did cause confusion and uncertainty as LOF studied how to comply with Title VII. LOF in this connection took note of the exception in Title VII (Section 703(e)) for employment where sex is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . .". LOF took further note that Title VII (Section 713(b)) contained a defense to liability for violations where it was pleaded and proved that the violation was in "good faith . . . reliance on any written interpretation or opinion" of EEOC.

LOF advised its personnel managers, before the effective date of Title VII, that it would comply with Title VII but that it was "in the dark" about how it would be administered, and would have to proceed "carefully" until "guidelines are established as to the meaning of nondiscrimination because of sex."

EEOC did issue guidelines on sex discrimination in November 1965; these were published in the Federal Register on December 2, 1965 (30 Fed. Reg. 14926). As so published, they referred to such conflicts as those between Title VII and the Illinois female overtime laws as "[p]robably the most difficult area considered . . .". They stated that it could not be assumed that "Congress intended to strike down such legislation". They stated further that state laws for the protection of women would be considered by EEOC "as a basis for application of the bona fide occupational qualification exception". While there were some reservations and qualifications in the guidelines as published in the Federal Register, their text, as issued with a press release by EEOC on November 22, 1965, stated that laws of the various states to protect women against "exploitation and hazard" would be considered by EEOC as "bona fide occupational qualifications and thus not in conflict with Title VII".

After the effective date of Title VII and the November 1965 EEOC guidelines, LOF continued its extra board practices for women employees at Ottawa, believing that in complying with Illinois law it was not in violation of Title VII.

Where LOF had plants in a state without laws against overtime for women, LOF made no distinction between men and women in hiring for production work and no extra board system was used. For example, this was true in Iowa where LOF had a plant in Mason City and where there were no laws against overtime for women.

Illinois, after the effective date of Title VII, continued to enforce its Female Employment Act to the knowledge of LOF. As late as January 1969, LOF asked the Illinois Department of Labor for permission to require a female *office* employee to work overtime. The request was denied on February 5, 1969, with the comments, among others, that Title VII was not intended "to disturb any State laws limiting the hours of employment for women" and that "we continue to enforce this labor statute."

On August 15, 1969, however, EEOC reversed its position as to state laws against overtime for women and amended its guidelines so as to find that such laws conflict with Title VII and cannot be the basis for the bona fide occupational qualification exception to Title VII. The new and reversed guidelines were published in the Federal Register on August 19, 1969 (34 Fed. Reg. 13367).

LOF promptly began to take steps to eliminate sex discrimination in Illinois and other states where this had been continued after Title VII because of state laws protective of women and in reliance on the 1965 EEOC guidelines. This change by LOF could not be made at once. There had to be studies of the several states where plants were located, new procedures had to be worked out where needed, the labor unions had to be consulted, and new labor agreements had to be drawn up and executed for locations affected. This process was completed for the Ottawa plants on March 5, 1970. After that date, women and men at Ottawa were hired on exactly the same basis, women were hired for work of any kind in production, and there was no extra board system.

It is without dispute in this case that there was no sex discrimination at the Ottawa plants of LOF for any period after March 5, 1970. It is also without dispute that before March 1970, there had never been any complaint by any woman about sex employment practices of LOF at Ottawa, about any claimed sex discrimination, about assignment to part-time work, about use of the extra board, or about any other matter included in this action. There was no grievance filed through the normal methods for handling claimed mistreatment. There was never any request by any woman for transfer from her assigned work to some other department of production. So far as LOF could tell, its women employees were entirely satisfied with working conditions at the Ottawa plants.

2.

Although the claimed sex discrimination had been practiced without protest for several years after the effective date of Title VII, it was not until after such discrimination had wholly ceased on March 5, 1970, that a charge was filed with EEOC.

On March 16, 1970, plaintiff Le Beau and a number of other women employees of LOF Ottawa filed a charge with EEOC covering the matters here in suit.

Under date of July 7, 1971, EEOC sent notice to Le Beau of her right to sue (pursuant to section 706(e) of Title VII).

On August 3, 1971, the complaint was filed in the District Court. Le Beau and a number of other women employees were plaintiffs, for themselves and for a class. The defendants were LOF, Local 19, and the International Union. The complaint seems to recognize that the claimed discriminatory practices had in fact ceased; there is an averment that the defendants "continue such practices until the present time, as the *residual effects* of said discrimination have remained virtually unchanged" (emphasis supplied). The relief sought was an injunction restraining discriminatory conduct and a mandatory injunction directing back pay and other benefits.

The International Union moved to dismiss the action as against it, primarily because it had not been named as respondent in the charge filed by plaintiff Le Beau with EEOC on March 16, 1970. The District Court granted the motion by order filed June 30, 1972. LOF and Local 19 then moved to dismiss the action as to them on the ground that the International Union was an indispensable party (Fed. R. Civ. P. 19). The District Court granted this motion by order filed October 3, 1972. Plaintiffs then appealed from the two orders of dismissal and on July 17, 1973, this Court handed down its opinion and decision (484 F.2d 798). The order dismissing the International Union was affirmed. The order dismissing LOF and Local 19 was reversed on the ground that they would suffer

no practical prejudice by an adjudication in the absence of the International Union. The action was remanded and continued against LOF and Local 19.

On December 6, 1973, Local 19 made a demand for trial by jury. Plaintiffs moved to strike this demand. The motion was granted and the jury demand stricken by order filed June 25, 1974, on the ground that there is no right to a jury trial where equitable relief is demanded.

The several plaintiffs moved, among other things, that the Court find "that the scope and membership of the class are as defined in the . . . complaint". The District Court by order filed June 17, 1974 granted this motion and in its order described the class as consisting of "all female employees paid on an hourly basis who were employed or had recall rights on July 2, 1965 or who are now employed at LOF" (Record, Doc. 83).

About a year later, the defendants moved the Court to reconsider the definition of the class. The Court, by order filed May 16, 1975, granted the motion, stating that:

> [T]he class in this case should include all hourly paid female employees either (1) who are now employed by LOF or who now have recall rights with LOF; (2) who were employed by LOF on July 2, 1965 or who have recall rights on that date, and who were not finally terminated from LOF's employ prior to December 16, 1969; or (3) who were employed by LOF after July 2, 1965, yet who were not finally terminated from LOF's employ prior to December 16, 1969. (Record, Doc. 115).

On May 20, 1975, EEOC filed a motion for leave to intervene as a party plaintiff in order to file a complaint as intervenor; the motion was said to be under Fed. R. Civ. P. 24(b)(1) and (2) and Sections 705(g)(6) and 706(f)(1) of Title VII; a proposed complaint was part of the moving papers. The proposed complaint set out substantially the same claimed discrimination as charged by the private plaintiffs. The relief sought was an injunction against future such conduct, an order to institute affirmative ac-

tion programs, and an order directing back pay to the private plaintiffs and class members. We do not find the papers in opposition to this motion in the record. Apparently, defendants did not raise in opposition the point that the statutory authority permitting EEOC to intervene was limited to actions "pending" before EEOC on March 24, 1972. By order filed June 27, 1975, the motion of EEOC to intervene was granted.

More than three years later, on October 10, 1978, LOF filed a motion to dismiss the EEOC as plaintiff-intervenor. The ground asserted was that since injunctive relief was no longer sought, the EEOC no longer represented a "general public interest" distinct from that of the private plaintiffs. This motion was denied. Subsequently, on July 3, 1979, more than four years after EEOC had been allowed to intervene, LOF filed a motion for "reconsideration" of its motion to dismiss EEOC and for the first time raised the point that Le Beau's complaint had not been "pending" before EEOC as of March 24, 1972 so that the statutory grant of permissive intervention by EEOC could not apply to this action. This motion was denied by an order of the District Court filed on October 22, 1979 (Record, Doc. 384).

The non-jury trial was held from October 6 through November 11, 1981. On April 6, 1982, Judge Parsons filed a "memorandum opinion and order" which was dated March 31, 1982. On the same date a separate judgment was entered.

The decision of the District Court was in favor of the "individual plaintiffs" (which, it seems clear, is meant to include them as representatives of the class) "on the question of liability" but "in favor of the defendants on the question of back wages". The decision was in favor of defendants against EEOC on all issues.

These four appeals followed.

3.

On the virtually undisputed facts shown in the record and found by the District Court, the essential issue on the appeals of plaintiffs and EEOC is whether the District Court was correct in denying back pay to plaintiffs and their class.

There were set out in the opinion below three reasons for denial of back pay.

The first reason was the provision in Section 713(b) of Title VII that no person "shall be subject to any liability" for violating Title VII "if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission". The District Court found that defendants' acts were in good faith, in conformity with, and in reliance on the 1965 guidelines of EEOC (op. 22, 23, 28, 29, 30; "op." references are to pages of the District Court's unpublished opinion as reproduced in the appendix submitted by plaintiffs and EEOC jointly). In view of the wording of Title VII that there shall be no "liability" in the circumstances, we think that the District Court was probably mistaken in entering judgment for plaintiffs on the issue of "liability", but this is a matter more of form than of substance.

The second reason was the unresolved conflict between the Illinois Act and Title VII as to overtime for women. Since defendants were on the "horns of a dilemma", they could not be liable for a violation of Title VII if their acts were in a good faith effort to comply with the Illinois Act (op. 16-20, 30).

The third reason was that EEOC is equitably estopped from claiming that defendants violated Title VII and the private plaintiffs "are equitably estopped from asking damages, in the form of claimed back wages or any other form" (op. 30-31).

4.

The argument for appellants in respect of reliance by LOF on the EEOC 1965 guidelines (Brief, pp. 38-49) is: (a) that the 1965 guidelines did not authorize, but prohibited, the practices of LOF which were adopted long before Title VII as a means of avoiding violation of the Illinois law against overtime by its women employees, and (b) that defendants did not rely in good faith on the 1965 guidelines because they made no "actual decision" to rely on them (Brief, p. 45) and because they did not act "as a reasonably prudent person" (Brief, p. 48).

4a.

The 1965 guidelines as published at 30 Fed. Reg. 14926 furnished no support for the argument of appellants that the guidelines do not authorize compliance with the Illinois Act, much less that they prohibit such compliance.

The guidelines contain this statement:

> Probably the most difficult area considered in these guidelines is the relation of Title VII to state legislation designed originally to protect women workers. The Commission cannot assume that Congress intended to strike down such legislation.

Thereafter, the guidelines discuss the "bona fide occupational exception as to sex" and give a number of examples to which the exception would not apply (§ 1604.1(a)(1)). None of the examples concern overtime practices such as those at Ottawa here involved. The guidelines then refer to laws intended to protect women, which seem clearly to include laws against overtime. The guidelines state (§ 1604.2(c)):

> (c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations

as a basis for application of the bona fide occupational qualification exception.

In this connection, it appears (LOF Brief, p. 50) that the brief *amicus curiae* submitted for the United States in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) contained this statement: "Under EEOC interpretive guidelines in effect from 1965 through August 1969, such State protective laws [as those in Illinois] were considered consistent with Title VII."

We believe that appellants are mistaken when they argue (*e.g.*, Brief, p. 42) that the 1965 guidelines "specifically prohibit sex-segregated job categories, seniority lists and lay-off systems. 29 C.F.R. § 1604.2". So they do, but with an important exception directly following in the cited section: "unless sex is a bona fide occupational qualification for that job". In the preceding section, as already quoted, the guidelines state, with reference to laws protecting women: "Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception" (§ 1604.1(c)).

The language of the "occupational qualification" exception in Title VII itself is compelling. That language is that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . ." (Title VII, § 703(e)).

To comply with the Illinois law against overtime for women, LOF had for many years employed men in those departments where overtime was regularly required and had employed women only in those departments where overtime was less frequent and where, from the nature of the work, calling in part time women employees would avoid overtime for any woman employee. This seems to meet the definition of "a bona fide occupational qualification reasonably necessary to the normal operation" of

LOF's business and, as such, would not be a violation of Title VII.

The meaning of the 1965 guidelines, according to the District Court, was that "federal law would not be violated by compliance with the state law" (op. 16) and that "if an employer's employment program for women is mandated by or in furtherance of compliance with the female employment practices law of the state, such practices may be continued [after the effective date of Title VII]".

This Court has already determined the meaning of the 1965 EEOC guidelines. This Court stated that "the Equal Employment Opportunity Commission ("E.E.O.C.") had ruled that good faith reliance on state female protective laws, such as the Illinois Female Employment Act, constituted a legitimate exception to Title VII . . ." *Williams v. General Foods Corp.*, 492 F.2d 399, 402 (7th Cir. 1974).

The conclusion of the District Court as to the meaning of the 1965 guidelines of EEOC is fair, reasonable, and in accord with precedent in this Court.

4b.

The District Court found that defendants "in fact relied on the published [1965] guidelines of E.E.O.C." and that "their reliance was in good faith" (op. 22). In a section titled "Reliance in Fact", the District Court referred over six or seven pages (op. 22-29) to some of the evidence on which it relied. This included testimony of LOF officers Ferguson and Kramer, exhibits, testimony of the Ottawa plant manager, testimony of Yarman (a union official), and correspondence between Yarman and the head of Local 19. The District Court described the evidence of reliance on the 1965 EEOC guidelines as "overwhelming" (op. 28). We agree.

As an example of the importance attached to the guidelines by LOF, a memorandum is in evidence from the LOF Executive Offices, to all plant managers, dated June 25, 1965—before any guidelines had been issued. This memo-

randum (LOF Appendix, pp. 37-38) contains the following statement:

> Naturally, we intend to comply with the law [Title VII], but until some guidelines are established as to the meaning of non-discrimination because of sex, we will have to feel our way carefully.

When EEOC changed its position and its guidelines in August 1969, LOF immediately set about to change its Ottawa employment practices, and after March 5, 1970 men and women were employed under the same conditions, whatever the Illinois laws provided. This is evidence of a reliance on EEOC guidelines; appellants themselves concede that it is "some evidence of reliance" (Brief, p. 47).

Appellants argue (Brief, pp. 45-47) that reliance was not proved because the District Court did not require evidence of "an actual decision to rely" (Brief, p. 45). While no formal or written decision declaring reliance is in the record, the finding of fact that there was such a decision may be made from all the evidence which is of record after a long trial. The two district court opinions cited by appellants to support their argument, *Kreitner v. Bendix Corp.*, 501 F. Supp. 415 (W.D. Mich. 1980) and *Stryker v. Register Publishing Co.*, 423 F. Supp. 476 (D. Conn. 1976), do not seem in point. They were rendered on motions for summary judgment, not after trial, and the opinions use the expression "actual reliance" and not "actual decision". "Actual reliance" seems the equivalent of "Reliance in Fact", the expression used in this instance by the Court below.

Appellants further argue (Brief, pp. 48, 49) that defendants cannot rely on § 713(b) of Title VII because they did not act as "a reasonable or prudent person". The argument depends on an acceptance of the earlier contentions that LOF was violating Title VII from its effective date in 1965. These contentions have not been accepted. The one decision cited by appellants (Brief, p. 48) for the "reasonable or prudent person" doctrine is *Beebe*

v. United States, 640 F.2d 1283, 1293-94 (Ct. Cl. 1981). That decision is not under Title VII and deals with a failure to conform to an administrative interpretation or regulation because of misunderstanding it; the decision thus deals more with conformity than with good faith. In any event, the record does not justify any finding that defendants failed to act as reasonable or prudent persons.

Looking at the record as a whole and without regard to whether the "clearly erroneous" test be applied or not, there is no basis for setting aside the finding of the District Court that defendants relied in good faith on the 1965 EEOC guidelines.

5.

From the District Court's opinion it is reasonable to conclude, as apparently did the parties, that, without regard to reliance on the EEOC guidelines, reliance on the Illinois Female Employment Act is a good reason for denial of back pay in this instance.

There is abundant authority for this view, including *Williams v. General Foods Corp.*, already cited, in this Court. Among many other decisions are *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240, 246-48 (3d Cir. 1973); *Manning v. International Union*, 466 F.2d 812, 816 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1007 (9th Cir. 1972); and *LeBlanc v. Southern Bell Telephone & Telegraph Co.*, 333 F. Supp. 602, 611 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972).

Williams v. General Foods Corp., cited above, is a near precedent in this Court for the case at bar. That decision was that, in reliance on the Illinois law, the employer had violated Title VII as to employment of women where overtime was required. The issue was back pay. The District Court had granted summary judgment to the employer. The decision was reversed. This Court recognized that back pay should ordinarily be awarded where viola-

tions are proved, but that "special circumstances", including reliance on state laws, would justify the denial of back pay, adding, moreover, that in *Williams* "it would not be an abuse of discretion for the lower court on remand to deny any award of back pay" (492 F.2d at 408). This Court stated (492 F.2d at 408) that "state statutes are entitled to the presumption of constitutionality until their invalidity is judicially declared". This Court also found that reliance on the Illinois statutes was "reasonable until the judicial determination of September 9, 1970 . . ." (492 F.2d at 408). The "judicial determination" was *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970). In remanding the case to determine an award of back pay or not, this Court approved a method of deciding whether back pay was appropriate by balancing the merits of the claim and its support in public policy against hardship on an employer acting in good faith. This, it seems to us, is precisely what the District Court did here.

Appellants recognize (Brief, p. 24) that the denial of back pay here was consistent with the authorities cited. The argument (Brief, p. 24 and following) is that *Albemarle Paper Co. v. Moody*, above cited, "squarely rejected" principles applied in many of those decisions. We do not believe this argument is accurate, among other reasons, because the Supreme Court in *Albemarle* expressly declined "to decide whether these decisions were correct" (422 U.S. at 423 fn. 18).

This Court has had occasion, however, to examine the effect of the Supreme Court's *Albemarle* decision. In *Stewart v. General Motors Corp.*, 542 F.2d 445 (1976), *cert. denied*, 433 U.S. 919 (1977), this Court discussed *Albemarle* and concluded that, in the absence of "special factors", back pay was to be awarded for a violation of Title VII. "Special factors", it was said, "usually include only circumstances where state legislation is in conflict with Title VII" (542 F.2d at 451).

We believe that the District Court correctly exercised its discretion by denying back pay where defendants relied

on the conflicting Illinois Female Employment Act before that Act had been judicially declared unconstitutional.

6.

The District Court found against liability of defendants on the claims made by EEOC because of equitable estoppel (op. 30, 31) and found that the plaintiffs were "equitably estopped from asking damages, in the form of claimed back wages or any other form" (op. 30).

Appellants address this matter in a footnote (Brief, p. 45 fn. 32) and in their Reply Brief (pp. 28-35). It is contended that there were no "material misrepresentations" by EEOC, that EEOC did not approve any "employment practices" of defendants, and that defendants relied on their own "unreasonable interpretation" of the 1965 guidelines. The position and published statements of EEOC have already been discussed, and this discussion need not be repeated. Nor is it necessary to consider whether the doctrine of equitable estoppel is applicable or not. Admittedly the award or denial of back pay is governed by equitable considerations, subject only to the restriction imposed by *Albemarle* that the reasons for a denial must be such that "if applied generally, would not frustrate the central statutory purposes" of Title VII (422 U.S. at 421). The District Court indicated the reasons for denial of back pay, one of the principal reasons being that no plaintiff or other member of the class had ever asked to work more overtime, had ever asked to be placed on a different seniority list, or had ever asked to be transferred to another department. This not only affects the equities of the situation, but it also means that plaintiffs have not met their burden of proof to show that each was "a potential victim of unlawful discrimination" (*Teamsters v. United States*, 431 U.S. 324, 327 (1977)) in that they would have accepted the overtime assignments, or would have transferred to another department, or would have otherwise acted to increase their economic benefits. No such showing was made, on any proper view of this record.

7.

There remain the cross-appeals of the two defendants. These ask for reversal of the order, filed June 27, 1975, permitting EEOC to intervene as a plaintiff-intervenor.

After EEOC has taken an active and leading part in this litigation for well over eight years, in the trial court and on these appeals, it would serve no useful purpose at this late stage to require dismissal of EEOC as a party. Presumably EEOC could still be heard *amicus curiae* and as such could be permitted to make and submit oral and written arguments. It would be cumbersome to follow such a procedure. Moreover, this long-lasting action seems now in its final chapter.

The argument for defendants is that the charge was not "pending" before EEOC on March 24, 1972, the effective date of the 1972 amendments to Title VII giving authority to EEOC to intervene in actions such as that at bar. This argument is entirely an afterthought, made much too late to hold the District Court in error for rejecting it.

EEOC's motion to intervene filed May 10, 1975, was opposed by defendants but not on the ground now pressed here. The motion was granted by order filed June 27, 1975.

Over three years later, LOF, on October 10, 1978, filed a motion to dismiss EEOC as plaintiff-intervenor but not on the ground now pressed here. The motion was denied.

Over four years later, on July 3, 1979, LOF filed a motion to reconsider its motion to dismiss EEOC as a party and for the first time raised the point that the charge was not "pending" before EEOC on March 24, 1972.

The record shows that, in opposition to LOF's motion, EEOC established, among other things, that the case was not administratively closed by EEOC until April 11, 1973 (Exhibit A to EEOC Memorandum in Opposition to Motion of LOF to Reconsider LOF's Motion to Dismiss Plaintiff-Intervenor). The motion was denied by order filed October 22, 1979.

Under all the circumstances, the District Court was justified, as are we, in treating the charge of plaintiff Le Beau as "pending" at EEOC on March 24, 1972.

On the appeals of plaintiffs and a class representative and on the appeal of EEOC, the judgment of the District Court is affirmed.

On the cross-appeals of defendant LOF and defendant Local 19, the order of the District Court, filed June 27, 1975, granting a motion by EEOC for leave to intervene as a plaintiff, is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

LORRAINE LE BEAU, et al.,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiffs,

vs.

LIBBEY-OWENS-FORD COMPANY an Ohio Corporation

and

LOCAL 19, UNITED GLASS AND CERAMIC WORKERS,
Defendants.

No. 71 C 1902

MEMORANDUM OPINION AND ORDER

INTRODUCTION

This is an action for sex discrimination being litigated pursuant to Section 706 (f) (1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.*, (hereinafter "Title VII"). Jurisdiction is invoked pursuant to 28 U.S.C., §§ 1343 and 1345.

On August 3, 1971, Loraine Le Beau and forty-five other present and former employees of the Ottawa, Illinois, plants of the Libbey-Owens-Ford Company sued the company (hereinafter referred to as "L.O.F.") and United Glass and Ceramic Workers of North America, AFL-CIO-CLC and local union at the Ottawa Facility, Local 19. On October 3, 1973 the International Union was dismissed from the suit because it had not been named in the original charge filed by Lorraine Le Beau with the E.E.O.C. This ruling was affirmed by the Seventh Circuit. *Le Beau v. Libbey-Owens Ford, et a.*, 484 F. 2d 798 (7th Cir. 1973). A similar jurisdictional issue is being determined by this

decision. The original charge was filed with E.E.O.C. by Lorraine Le Beau only. It was received on March 16, 1970, was filed on that date and designated on that date as Charge No. TC HO-1080. In it Mrs. Le Beau stated "There are about 30 women affected by this." Thereafter thirty-two other women signed a separate statement and submitted it to the E.E.O.C., stating that:

> "We, the undersigned, due [sic] hereby declare that we are in complete agreement with Lorraine Le Beau with filing a complaint against Libbey-Owens-Ford Glass Co. with the Equal Opportunity Office in Washington, D.C."

Lorraine Le Beau's charge was served upon the company and the unions about April 16, 1970. On July 10, 1970, after the E.E.O.C. investigation of charge No. TC HO-1080, the "Regional Director's Findings of Fact" on the Le Beau charge was served upon the company and the unions. Settlement attempts failed and on July 7, 1971, E.E.O.C. issued to her only and in Charge No. TC HO-1080, a "Notice of Right to Sue". E.E.O.C. neither treated the statement of the 30 additional women as setting up a separate charge as to them nor as an amendment to Lorraine Le Beau's charge to cause it to include them as charging parties, but copies of Le Beau's "Notice of Right-to-Sue" were sent to these additional women. When this case was started Lorraine Le Beau and the 32 "other women" were joined by 13 additional women as named plaintiffs in this case. Under the statute and regulations of the Commission I find in this situation the notice given to Le Beau on her charge sufficient for purposes of jurisdiction to have all 46 women sign the complaint and be designated as named plaintiffs representing as a class all of the women employees of L.O.F. referred to by her in her charge to E.E.O.C. (See Resolution of Remaining Motions and Objections, *sub:*

The Le Beau charge alleged a continuing violation and was filed within the statutory 90 days following the

date on which all of the parties agree that the alleged discriminatory practices may be deemed to have terminated - March 5, 1970.

On January 15, 1974, seven of the named plaintiffs asked to withdraw from the case and subsequently were dismissed with prejudice. Then on June 26, 1975, the E.E.O.C. was granted leave to proceed in the case as an Intervening Plaintiff, and thereafter took over the management of the plaintiffs' case as a class action. The action charged a historic practice of permitting women to work on a part-time basis in a segregated unit of the plant at discriminatory wages and placing them on a separate discriminatory seniority list.

In brief, the class as finally defined by court order was described as including all hourly paid female employees who were employed on July 2, 1965 or had recall rights on that date and who were not finally terminated prior to December 16, 1969; or who were employed after July 2, 1965 and were not finally terminated prior to December 16, 1969. July 2, 1965 is the effective date of Title VII. December 16, 1969 is the date on which letters were mailed to all part-time women employees offering the full time employment. Class notice was mailed to 87 women. In June of 1979 Statement of Claim forms were mailed to those women who by then had not submitted statements opting out of the class. Nineteen (19) such claim forms were returned.

Amendments to complaints and answers were liberally allowed even until April 21, 1981, when Local 19 filed an amended answer to the plaintiff 's last amended complaint, setting forth certain new affirmative defenses. A great deal of animosity persisted among counsel. Discovery was extensive, proceeding over a terrain made rugged by severe advocacy and multi-briefed motions. Pre-trial conferences turned out to be relatively fruitless. Finally the case went to trial on October 6, 1981, with the receipt of evidence

made subject to rulings to be made on a number of motions, and continued until November 11, 1981.

RESOLUTION OF REMAINING MOTIONS AND OBJECTIONS

As indicated above, at the time the case went to trial there were several pre-trial motions which had not been ruled on. We proceeded on to trial with the understanding that formal rulings on those motions would be made a part of the record. By separate order entered today the rulings on those motions are being made a part of the record, and because of the collateral nature of such rulings they, and where necessary the reasons for them are set out in the footnotes below.[1]

During the course of the trial a number of objections were made at times when it was necessary to proceed on with the receipt of evidence. Evidence was received subject to objections. A list of 15 of such pending objections and

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[1] Rulings on Certain Motions Made Prior to Trial:

1) Motion of defendant Local 19 to strike plaintiff-intervenor's responses to certain requests for admissions. Where the responses exceeded the requested admissions the excesses have been ignored. Evidence has now been received bearing upon the issues raised by other requests which requests were incompletely answered or were evasive. The motion is now moot and is denied.

2) Motion of defendant L.O.F. to strike plaintiffs' and E.E.O.C.'s responses to defendant, Local 19's requests for admissions and for certain other requests to be deemed admitted. This motion was filed on February 3, 1981. For the reasons set out in 1) above this motion also is now moot and is denied.

3) Motion of L.O.F. for sanctions against the defendants made on October 5, 1978. The trial of the case has served to moot this motion and it is denied.

4) Motion of E.E.O.C. to dismiss as moot L.O.F.'s motion for sanctions. This motion was filed on June 26, 1981. The motion of L.O.F. for sanctions is moot, as is now the motion of E.E.O.C. It also is denied.

motions together with the rulings which have been made on them is found in a separate order and made a part of the record this day. The parties may presume that all evidence properly to have been considered has been considered and that all evidence which properly should not have been considered has not been considered. Because of the collateral nature of these objections the rulings on them and the reasons for such rulings are set out in the footnotes below.[2]

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[2] Rulings on motions and objections made during the trial but on which rulings were deferred or taken under advisement.

1) Defendants were given a standing objection to admission of plaintiffs' and plaintiff-intervenor's evidence respecting liability prior to December 16, 1969. This objection is now overruled, and the evidence received subject to it will be considered in deciding the case. What defendants sought by their objection was a ruling prior to receipt of all the evidence to the effect that their alleged reliance on the E.E.O.C. guidelines published in 1965 constituted a valid defense to the charge of discrimination prior to December 16, 1969. But the evidence sought to be excluded was necessary for a determination of defendants' affirmative defense. The standing objection must now be overruled in order for the court to determine the good faith of the affirmative defense.

2) Plaintiffs' and plaintiff-intervenor's standing objection to the admission in evidence of testimony and exhibits regarding wage losses prior to March 16, 1968 must now be overruled if the court finds the defendants liable or sustained if there is a finding of no liability. The ruling on the standing objection will be implicit in the court's ruling on the question of liability.

3) Defendants' standing objection to the admission of evidence as to matters which occurred after March 5, 1970, the stipulated termination date of the separate programs of employment for men and women should have been sustained when made. This objection is now allowed and any post March 5, 1970 evidence received will be considered only in so far as it tends to describe the circumstances under which the parties acted during the crucial time in issue: July 2, 1965 to March 5, 1970.

4) Local 19's objection to the admission of evidence against it of wage losses of named plaintiffs and class members other

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than Lorraine Le Beau since only she signed the charge sent to E.E.O.C. must be overruled, in that the court, as stated in the body of the opinion, finds that the named plaintiffs who did not send in the charge are by their separate letter deemed to have joined in with Lorraine Le Beau for purposes of this case and thus were entitled to sign the complaint in court.

5) Defendants' motion for directed verdict at the close of plaintiffs' case was taken under advisement. Taking into consideration all of the evidence, the motion should be and it is denied. The nature of defendants' affirmative defense serves, like a demurrer, as an acknowledgement that a *prima facie* case has been presented by plaintiffs. In addition defendants in their answers to requests for admissions acknowledge, at least the minimum of facts needed by plaintiffs to establish a *prima facie* case.

6) Defendants L.O.F.'s motion to exclude Social Security earnings statements of some of the class members for failure of plaintiffs to produce them during discovery is denied. Sufficient opportunity was given defendants to meet this evidence.

7) Plaintiffs' motion to preserve the claim of Rosalie Leake which was tendered for filing after the trial of the case was begun, is denied. The time allowed for the filing of claims was substantial and the cut-off date was firm. Tender of a new claim during the course of the trial of the case allowed defendants no meaningful opportunity to investigate the claim. Calculations which had been made based upon claims which had been filed during the time set aside therefor would have to have been revised. To permit this claim to be filed during trial would be unfair to defendants.

8) Plaintiffs' motions to preserve claims of class members who had predeceased the trial, made orally during the course of the trial are allowed to the extent to which they can be proved-up by facts received in evidence. Title VII actions against a non-governmental employer, unlike actions made possible by statutes originating in the post-civil war acts (1862-1871), are actions in equity. (42 U.S.C. 2000e-5-g.) There is no federal rule as to the survival of such a Title VII action. In 42 U.S.C. § 1983 cases, and other cases growing out of the post-civil war civil rights acts, under the authority of 42 U.S.C. § 1988 we would look to the law of Illinois. *Beard v. Robinson*, 563 F. 2d 331, 333 (7th Cir. 1977). Even without statutory authority, where a federal action is in equity, in order to obviate the need to fashion an

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independent federal common law rule, we still would have to look to Illinois law. *Beard v. Robinson, supra.* The general rule in Illinois and in the Majority of jurisdictions is that an equitable cause of action itself does not abate. *Warner v. Flack*, 278 Ill. 303, 307 (1917); 1 Am. Jr. 2d *Abatement, Survival and Revival* § 75 (1962). If because of the absence of a decedent a claim cannot be proved-up from the facts in evidence, under the authority derived generally from 42 U.S.C. 2000e-5-g, the court directs that then the action on the claim itself abate in order that the entire case be final and subject to appeal under 42 U.S.C. 2000e-5-j.

9) Plaintiffs' motions to preserve the filed claims of sick or absent class members are allowed, but the amounts to be allowed of the claims must be established by other facts admitted into evidence.

10) E.E.O.C.'s motion for sanctions to exclude evidence not made available to plaintiffs by defendants until trial of case is denied. The court in considering the matter on the basis of sanctions finds that the evidence was not purposely withheld from plaintiffs and the opportunity was given plaintiffs to study and prepare to meet such evidence during the progress of the case on trial.

11) E.E.O.C.'s motion that evidence of state law relied upon by defendants be limited in application to a defense to the claim of denial of overtime opportunities and not applied to the claim of segregated job classification and lines of progression is denied. In the absence of an order limiting the defense to the issue of the denial of overtime opportunities, the defendants'evidence may be admitted as to all issues.

12) E.E.O.C.'s objection to the use by defendants of part of Wayne Yarman's deposition is denied under Rule 32, F.R.C.P.

13) E.E.O.C.'s motion to strike the testimony of Edwin Meyer is denied in so far as his testimony was relevant, material and otherwise admissible.

14) Defendant L.O.F.'s motion for expeditious filing of post-trial briefs is denied because substantial time was allotted for closing oral arguments, and a schedule set up for the cross filing of proposed findings of fact and conclusions of law.

15) Local 19's motion at end of government's case and again at end of its case, preserving objection set out in paragraph numbered 4 above, that all evidence of named plaintiffs and class

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members other than Lorraine Le Beau be stricken on grounds of lack of subject matter jurisdiction. This motion as renewed must be overruled and denied. Of course it is true on the facts that the only formal charge filed with E.E.O.C. was that of Lorraine Le Beau, that the Right-to-Sue-letter was issued only in her name, and further that the matter of which she complained turned out in the trial of the case to be treatment which for the most part she in fact did not fully protestably experience. Subsequent to the effective date of the Act of 1964 her employment occurred during the last months of the crucial period. She went to work full-time, and the only lay off she experienced was not a lay off of women only but was a brief shut-down of the production lines of the plants which affected men as well as women employees. In other words, she was found to have been a meager representative of the class of women described in the charge she filed with E.E.O.C. and in the complaint which along with 32 other women she signed and filed in this court. Once the complaint was filed alleging generally the same or similar conduct found in the charge, she as well as other plaintiffs and class members could seek, as in this case, to prove sex discrimination on the part of the defendants during the period in question. The Seventh Circuit has held that when a person aggrieved for the same reason as another in a Title VII action who had filed the required charge with the E.E.O.C., he is deemed also to have satisfied the jurisdictional prerequisite without having filed the same charge with E.E.O.C. *Eichman v. Ind. State Univ. Bd. of Trustees*, 597 F. 2d 1104, 1108 (7th Cir. 1979). The Court of Appeals stated that "Title VII does not Require that as a prerequisite to suit an individual alleging discrimination must first file a complaint with the EEOC. Instead, the statutory language speaks of a charge filed '*by or on behalf* of a person claiming to be aggrieved'...." 597 F. 2d at 1108. The Fifth Circuit also has held that a single plaintiff may meet the jurisdictional prerequisites of filing a charge and receiving statutory notice from E.E.O.C., and that claims of all members of the class may be asserted and allowed even though they did not file a charge with E.E.O.C., *Wheeler v. American Home Products Corp.*, 563 F. 2d 1233, 1238 (5th Cir. 1977) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 fn. 8, 95 S.Ct. 2362, 45 L. Ed 2d 280 (1975)). See *Bell v. Automobile Club of Michigan*, 80 F.R.D. 228, 235 (E.D. Mich. 1978); *Hauck v. Xerox Corp.*, 493 F. Supp. 1340, 1349 (E.D. Pa. 1980) (*citing Sanchez v. Standard Brands, Inc.*, 431 F. 2d 455 (5th Cir. 1970)); *Dickerson v. U.S. Steel Corp.*, 439 F. Supp. 55, 68 (E.D. Pa. 1977). Equity does not

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allow form to prevail over substance.

Accordingly, the fact that Lorraine Le Beau, between July 2, 1965 and July 14, 1969, never reported for work when called (and she was called many times), and when in July of 1969 upon receipt of a letter offering her full-time employment reported for work for the first time in many years, does not defeat the charge as alleged in the complaints filed in this case, jurisdictionally or otherwise.

BACKGROUND OF CASE

The setting in which the events occurred which give rise to this case is a historic small Illinois town of about 18,000 people located in this District on the Illinois River 40 miles west of Joliet and 75 miles southwest of Chicago named Ottawa. For 150 years it has served as a river port for shipping grain from the surrounding region into Chicago. More uniquely, it has a combination of rich coal deposits nearby and local deposits of sandstone, both important in the siliceous sand and glass making industries. Since the 1930's it has been, according to the testimony of one witness, primarily a one company town. That company is the defendant, Libbey-Owens-Ford, a Toledo, Ohio based corporation with plants in at least seven states.

The Ottawa facility of Libbey-Owens-Ford operates two of its plants (Plant 5 and Plant 7) and handles its personnel matters with a degree of local autonomy. Subject to the master labor agreement entered into between the parent company and the International of the United Glass and Ceramic Workers Union, it negotiates its own working schedules with the local of the union, the defendant Local 19.

One or more members of almost every settled household work at the Ottawa facility of L.O.F. and in turn L.O.F. (Ottawa) and local 19 are intimately involved in matters of general community welfare and interest. The employees are acquainted with each other not only as co-workers but also as neighbors and much of their knowledge about what is going on at L.O.F. does not require, as it would in a large city, formal lines of communication. For example, Dale G. Ferguson, L.O.F. 's Ottawa Industrial Relations Manager, a man of mature years who had worked for L.O.F. almost all of his adult life, knew personally most of the women who testified. He had gone to school with many of them and participated in social and community affairs with them.

From its earliest years L.O.F. (Ottawa) hired women

in various "traditional" women's jobs, and in the production part of the factory hired women who wished to do that kind of work under part-time or extra-board types of arrangements. This allowed them, without seriously interfering with their ordinary roles as mothers and homemakers, to work at the factory when production demands exceeded the regular ability of the men to produce. The Illinois Female Employment Statute predated the opening of the Ottawa facility. From its beginning in Ottawa L. O. F. tried to keep its employment of women within the limits permitted by the statute. That meant that no woman could be worked more than eight hours a day or forty-eight hours a week.

When World War II came and the men left the factory for military service, the restrictions of the Illinois statute were suspended so that women could, by taking over the work of the men on production lines, make their contribution to the war effort. Women replaced the men full-time in the Ottawa plants of L. O. F. The Ottawa facility was converted to accommodate special military contracts. The women witnesses referred to it as the days when they worked in aircraft. When the war came to an end the women were required to turn most of their jobs back over to their returning husbands and sons, and to return to their housework and to part-time or extra-board employment in the plants. When this happened, the union and the company stipulated to preferential hiring of women in Plastics and Assembly as they stepped out of full-time productions jobs to make room for the veterans.

Technological improvements brought about the production of newer types of automobile window and windshield glass, shatter-proof glass (shatterproofing involves the interlining of glass sheets with plastic) and of new methods of laminating glass. L. O. F. in Ottawa then found itself with two somewhat new departments, Plastics and Assembly. There had been Plastics and Assembly departmental work prior to the changes that came about

after the war, and women had worked with men in them, but on a constrained basis under a separate seniority list. Their job listings were sex-related, such as "Assembly Girls". Then the whole of the two departments changed in the nature of the speed of production. As changed, the two departments were referred to as non-continuous operations reflecting their nature as against that of the other departments which worked on a continuous operation. Production in these new finishing departments moved faster than in the other departments of the plant, and since work in them could be scheduled in spurts or in shorter than average work days, part-time women workers more easily could be assigned to these departments. L. O. F. entered into labor agreements with the union giving women union membership, recognizing them only on a separate seniority list, and assigning them almost exclusively to these departments. This presumably gave the company, it claimed, an opportunity to more easily follow an orderly program for employing women on a part-time basis with more assurance that it would not violate the Illinois Female Employment Act. For example, in some of the other departments cool-down time and clean-up time made daily overtime mandatory for some men on the eight-hour shift. The separate seniority lists were handled differently. When there were plant reductions men bumped each other according to seniority and when bumped out, left by way of the Labor Department and were no longer employed. Women, when bumped down according to their own seniority, never lost their jobs but were retained in the extra-board subject to recall on a day-to-day basis.

For another reason this arrangement seemed well suited to the employment of women. Plastic interlining of shatterproof glass had to be performed in a clean air-conditioned environment. There could be no dust, lint or smoke. Workers in the Plastic Department had to wear lint-proof uniforms and workers from other departments were not permitted to enter it freely. One woman witness

mistakenly thought that the "Keep Out" signs on the outside of the doors to Plastics were for the purpose of keeping the men away from the women. This employment program admittedly placed women in departmental and working area segregation. It left women unable to bid for higher paying jobs in other departments, and provided for them daily lay-offs and irregular recalls. This continued over the years. It continued after the enactment and effective date of Equal Employment Opportunities Act and until the defendants finally negotiated and implemented a program for eliminating all distinctions between men and women production line workers. This began in 1969 right after E.E.O.C. announced its revised guidelines regarding the conflict between Title VII and state female employment laws, but was not completed until March 5, 1970.

THE PLAINTIFFS' CASE

The evidence and the record leave it unclear how the movement among the women to initiate this suit got started. It is clear that until the filing of the Lorraine Le Beau charge with the E.E.O.C. neither written nor oral protest had been made to the company nor grievance filed with the union. Prior to the filing of the charge there were occasional meetings of the women in the St. Francis Church and the Ramada Inn in Ottawa at which trial counsel for the individual plaintiffs as well as trial counsel for the E.E.O.C. attended. These meeting apparently began in 1969 and continued over the years into the trial of the case. The original complaint charged a continuing course of conduct and sought both injunctive and monetary relief, but after the E.E.O.C. itself joined the case as an intervenor in the final amended complaint, it recognized that the discriminatory practices as a policy ceased on March 5, 1970 and sought only back wages from the effective date of Tile VII through March 4, 1970. The parties disagree as to how far back restoration of unearned wages might go, but the 1972 amendment to the Civil Rights Act of 1964 which gave the E.E.O.C. the authority to seek to intervene

in these cases also limited back wages to the two years prior to the filing of the charge.

Since the posture of the defendants in the case was a virtual acknowledgment that from prior to July 2, 1965, and up until March 5, 1970, the company with at least the acquiescence of the union, if not its cooperation, limited, segregated and classified its employees insuch a manner as to deprive women employees of employment opportunities because of their sex, little or no proof was needed to establish on behalf of the plaintiffs a *prima facie* case. Each of the women's testimony followed almost the same theme: (a) that when she was employed she was interviewed, put to work for a one to two week training period and then sent home with a lay-off slip; (b) that later she realized that she was being employed on a part-time basis; (c) that from time to time she was called back from off a seniority list made up only of women; (d) that she as all other women worked only in the Plastics and Assembly departments; (e) that she could not bid against men for other jobs in the plants; (f) that many men were working full-time in higher paying jobs but had less seniority than she; (g) that there were numerous periods of time when her total earnings were very low; and (h) that even years after the enactment of the fair employment practices law, neither the company nor the union volunteered to do anything about it. Most of their testimony was devoted to proving-up the dollar value of their claims.

According to the evidence produced by the women plaintiffs, wages not earned by them over the full five years because they were not employed full-time at salaries paid men with the same seniority, from the date of each woman's first employment, or from July 2, 1965, whichever was the later, reduced by the amount each woman had earned and mitigated by amounts each had earned from unemployment compensation or from other part-time employment together with accrued interest, varied from women to woman in amounts from $5,448.30 to $87,507.77.

The total amounts claimed to be due them for the entire years of 1965 to 1970 (the effective date of E.E.O.C. was July 2, 1965 and the end of the period in question was March 5, 1970) was $2,784,595.56. These amounts recited herein are subject to some adjustments that are found in the record, but fairly represent the plaintiffs' picture of the case.

THE DEFENDANTS' CASE

Both in the pleadings and in the evidence adduced at trial the defendants have sought to put forth a defense of good faith reliance on administrative interpretations of Title VII in dealing with what appeared to be a possible conflict between the laws of the State of Illinois and the Laws of the United States. They asked the court to take judicial notice of the Illinois Female Employment Act, a law that had been on the books since 1909 and a law designed to protect women from sweatshop employment. They offered evidence to show that employment of women full-time in most departments of the plant could not effectively be carried out without the risk of disobeying the Illinois statute; that part-time employment in the Plastics and Assembly departments is desirable from the Company's point of view and suited to the desires of the majority of the women; that employment of women under those circumstances required that they be on a separate seniority list; that the E.E.O.C. within a short time following the effective date of the federal law issued advisory guidelines which stated that federal law would not be violated by compliance with the state law; and that as soon as E.E.O.C. changed its position on this conflict the defendants proceeded forthwith to change its program to comply with the literal language of the Act of 1964.

RELIANCE AS A MATTER OF LAW

The Illinois Female Employment Act, *Ill. Rev. Stat.*, ch. 48, Sec. 5 *et seq.*) provided as follows:

§ *Limitation on hours of labor of females*

> No female shall be employed in any mechanical or Mercantile establishment, or factory . . . more than eight hours during any one day nor more than forty-eights (48) hours in any one week. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four hours of any day.

This statute was enacted in 1909, and remained on the books of the Illinois statutes until repealed by the State Legislature on October 1, 1977. It's operation was suspended for the war by an act of the legislature in 1937. The sanctions for violation of the Illinois Act as contained in the original statute, and as they remained until it was repealed, read as follows:

> Any employer who requires or permits any female to work in any of the places mentioned in Section 1 of this act more than the number of hours provided for in this act, during any day of 24 hours, or who fails, neglects or refuses so to arrange the work of females in his employ that they shall not work more than the number of hours provided for in this act, during any one day, or who permits any overseer, superintendent or other agent of any such employer to violate any of the provisions of this act, or who in violation of paragraph (f) of Section 1-1/2 deducts the excess worked in one day from any subsequent regularly scheduled employment time shall be guilty of a misdemeanor and upon conviction thereof shall be fined for each offense in a sum of not less than $25.00 or more than $100.00.

Ill. Rev. Stat. ch 48 § 6 (footnotes omitted).

The pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) provides as follows:

> It shall be an unlawful employment practice for an employer -
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

> conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Act by its own terms became effective July 2, 1965.

The first guidelines of the E.E.O.C. recognizing and addressing the potential conflict between the Illinois Act (and the female employment protectional acts of other states) and Title VII was published in November of 1965. It read in pertinent part as follows:

> Probably the most difficult area considered in these guidelines is the relationship of Title VII to state legislation designed originally to protect women workers. The Commission cannot assume Congress intended to strike down such legislation.
>
> * * *
>
> (c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard . . . .
>
> * * *
>
> (1) An employer, accordingly will not be considered to be engaged in an unlawful practice when he refuses to employ a woman in a job in which women are legally prohibited from being employed or which involve duties which women may not legally be permited to perform because of hazards reasonably to be apprehended from such employment.

29 C.F.R. § 1604.1(c) (1966).

Four years later the E.E.O.C. changed its position on the legality of state female employment acts by new guidelines published in 1970. They read in part as follows:

> (b)(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bonafide occupational qualification exception.

29 C.F.R. § 1604.1 (1970).

The Illinois Act was declared unconstitutional by a decision of Judge Omar Poos of Springfield in 1970, in a case entitled *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970) in which he said at page 1307:

> The Illinois Female Employment Act requires each plaintiff to discriminate against its individual employees with respect to compensation, terms, conditions and privileges of employment because of their sex.
>
> The Illinois Female Employment Act conflicts with the provisions of Title VII of the Federal Civil Rights Act of 1964. Accordingly, pursuant to the supremacy clause of the United States Constitution (Article VI, Cl. 2), the Illinois Female Employment Act is void and of no force and effect as to each of the plaintiffs.

The first judicial determination of the posture of L.O.F. with relation to the conflict between state and federal law relating to female employment was not handed down until 1973 when Judge Don J. Young, of the Northern District of Ohio in *Raitz v. Libbey-Ownes-Ford Glass Co.*, No. 70-99,p. 4 (N.D. Ohio, Sept. 23, 1973), stated:

> The conflict put the defendants upon the horns of a dilemma, which the guidelines issued by the federal government at first did nothing to resolve, and at last made more difficult, until the courts finally acted to construe the conflicting federal and state laws. While from a theoretical legal standpoint what the resolution of this conflict would be was in little doubt, from the standpoint of the individuals and corporation who were involved in it, the matter was by no means simple. The state statutes provided criminal sanctions, and no lawyer who practices in the criminal field dares to advise a client that if he commits an act in violation of law he will certainly not be punished for it. No attorney, however learned, can predict with complete accuracy how the courts will resolve even the simplest lawsuit. Consequently, no litigant should be required to make a guess at the outcome of his litigation, which, if wrong, would result in the imposition of criminal sanctions. (Opinion at p. 4).

In many respects this case and the *Raitz* case in Ohio were related. They were started at about the same time. They involved the same employer, L.O.F., and the same employer conduct between July 2, 1965 and Spring of 1970 (February 4, 1970 in *Raitz* and March 4, 1970 here). They involved similar provisions of state female protection statutes, and in particular provisions preventing overtime employment of females. (Section 4107.46 of the Ohio Revised Code dealt with "total hours and days of employment" as did the Illinois statute.) Judge Young in *Raitz* ruled as a matter of law that where an unresolved conflict between federal and state statutes had been interpreted by the E.E.O.C. favorably to the state statute, and the employer defendant had been placed "upon the horns of a dilemma", he could not be charged with having violated the federal law. He granted summary judgment. In an earlier similar case, *Manning v. General Motors*, N. Dist. of Ohio, C-69-334, *aff'd.* 466 F. 812 (6th Cir. 1972), Judge Young did not apply this type of rule in a summary judg-

ment manner (he had before him the Ohio Director of the Department of Industrial Relations and an opportunity to declare the Ohio statute unconstitutional), but after trial he denied injunctive relief and then denied back pay to the women.

An early motion for summary judgment was not filed in this case, though shortly afterwards the Illinois statute was declared unconstitutional. Motions to dismiss on class action and jurisdictional disputes were first litigated and appealed. Then when the case was returned to the District Court a number of changes had taken place. The 1972 Amendment to the 1964 Act had been enacted making it possible for E.E.O.C. itself to intervene in these actions, reenforcing the affirmative action nature of the equitable relief made available to complaining plaintiffs, and limiting back pay to two years prior to the filing of the charge with E.E.O.C. seeking administrative relief. In addition, a number of sex discrimination cases involving the question about the state-federal law conflict had been decided and concluded, some after appeal to the courts of appeals, and, in several, after certiorari had been denied by the Supreme Court. Incidentally, in none of these cases had back pay been allowed, and this court has had no case cited to it nor has it found any case growing out of the conflict between state female protective statutes and Title VII in which back pay has been allowed. The Supreme Court in a race discrimination case, *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), had indicated that good faith reliance upon E.E.O.C.'s opinion about these conflicts of law is a defense to back pay. *Albemarle, supra* at 422, 423 fn. 17, 448. Under the circumstances plaintiff-intervener had a right to demand proof of the good faith of defendant's claim of reliance on its opinions. This is consistent with the provisions of Title VII as amended.

Section 713(b) of Title VII, 42 U.S.C. § 2000-e- 12(b) provides a defense for any "such person [who has committed] an unlawful employment practice if he pleads and

proves that the act or omission complained of was in good faith, in conformity with, and in relation to any written interpretation or opinion of the Commission." A written interpretation or opinion of the E.E.O.C. includes any E.E.O.C. matter published in the *Federal Register* and designated as such. The 1965 and 1969 guidelines were published in the *Federal Register*.

Defendants accepted their burden and produced evidence, which was not shaken by cross-examination of witnesses or by contradictory evidence, not only that they in fact relied on the published guidelines of E.E.O.C., but that considering all of the circumstances their reliance was in good faith.

RELIANCE IN FACT

The program of segregated employment, separate seniority lists and limited hours of employment for women in the Ottawa facility did not arise out of a deliberate and insidious discriminatory intent. The practices themselves were the product of an effort of the defendants to accommodate what they realized was a sociological transition of women from a historic work role characterized principally by the physical differences between women and men to a role in which those differences are minimized. The facts support the inference that the defendants were aware of and receptive to that transition before the individual plaintiffs were.

When after the enactment of the 1964 Act E.E.O.C. descended upon the Ottawa scene and until 1969 it conditionally approved the role the defendants were playing in the transition. The condition was twofold: (1) that the continuing of their employment program for women in the face of the broad proscriptions of Title VII was the product of a good faith reliance on the ability of the program to keep them in compliance with Illinois' definition of the proper role of employers during this transition, and (2) that in following the Illinois definition defendants in good faith

relied upon E.E.O.C.'s opinion that following the Illinois definition satisfied the proscriptions of Title VII. As shown above if both of these conditions were met, defendants even if found to have been in technical violation of Title VII, cannot be made to answer to the individual plaintiffs in back wages. From the evidence in the record and the testimony of the witnesses I find that both of these conditions have been met and that judgment should be entered for the defendants.

1. There was substantial and pursuasive testimony from the defendants' witnesses and particularly Dale Ferguson, Director of Industrial Relations at the Ottawa facility, and Lester N. Kramer, the Vice President for Employment Relations of the Glass Division of L.O.F., that the use of part-time employment, separate seniority lists and employment in Plastics and Assembly only, were crucial to L.O.F. in a good faith, determined effort on its part to comply with the Illinois Female Employment Act. The testimony of L.O.F.'s witnesses was that the number of hours women worked was deliberately limited and monitored by the plant managers. There were occasions when plant managers were faced with grievances from the union because they had to turn down female applicants for jobs that required overtime. Plant managers regularly referred to "state law" in their discussions with women employees. State investigators checked the time records regularly and there were occasions when reports of violations were made to the company president by the Office of the State Director of Labor. Most of the violations which occurred were with relation to office personnel who, in contrast to the factory workers, were not on an extra-board scheduling system. The need to comply with state law seems to have been a source of constant irritation with the plant managers. Top management held them responsible. Often they were made to "face the music" when inspectors found violations. Occasionally they would contact the Office of the State Director of Labor ahead of time and ask

for a "little relief", and occasionally would get a "ten hour day" for one woman.

It is clear from the evidence that Toledo held the plant manager strictly responsible for not violating the state law. He was advised about the law. He received copies of the law and he was expected to keep up to date about it. Apparently, compliance with the state law gave very little trouble in the Plastics and Assembly departments. The reasonable inferences from the evidence are that the separate seniority lists and the use of the "layoff, call-in" system in those departments kept compliance with the state law well in hand. According to some testimony, production line compliance was also assisted by the I.R.C. man. He was the union representative who kept records on time and seniority, and designated the women who were to be "called-in".

The real importance of the use of Plastics and Assembly departments was the fact that their stop-and-go schedule accommodated part-time work and assured the minimum of overtime work. The Labor department in particular required overtime. Maintenance worked the most overtime. The Grinding and Polishing department had to work overtime whenever full operation was necessary to meet production demands. The Bending department worked considerable overtime. It's work involved a 1-2 hour cool-off and clean-up time following a full 8 hours of production. And management efficiency required that several departments work during high production a 6th day on a 5-day week and a 7th day on a 6-day week. Testimony concerning these matters was confirmed by overtime records on the wage payroll sheets.

Testimony corroborating the evidence that assigning production line women to Plastics and Assembly helped avoid overtime for them came from a Dr. John McDonald of the Illinois Institute of Technology who examined 3 years of attendance records. His study revealed that there were

instances of women working overtime, but that the chances for a woman working in the plant for more than 40 hours a week were far less than for workers generally. He said that his findings reflected that mere chance was not involved, but that there was a probable relationship between the hours women worked and the efforts of the company to comply with the Illinois Female Employment Statute.

2. It clearly appears from the testimony of defendants' witnesses and from exhibits in evidence that defendants found in the publication in 1965 of E.E.O.C. 's guidelines approving reliance upon State Female Employment Statutes, substantial relief from concern that their practices with relation to the employment of women might be in violation of the Act of 1964. Then defendants found that the reversal of the original position of E.E.O.C. when it published its 1969 guidelines removed from defendants all assurance they had had that their pursuit of the program of employment between 1965 and 1969 was lawful.

The extent to which defendants relied on current opinions and guidelines of E.E.O.C. is seen in the sequence of events which transpired in the corporate offices in Toledo from the time of the enactment of the 1964 Act. The Vice-President for Employment Affairs of L.O.F. became familiar with the 1964 Act "almost as soon as it was passed." It was widely reported in all the labor news and bulletins which regularly come across the company desk. Immediately a meeting was called of the Glass Management Policy Committee. This meeting was followed by a letter circulated throughout the company indicating that changes would have to be made before the effective date of the Act. In the period between the enactment of the Act and January of 1965 an officer was sent to the plant in Shreveport, Louisiana to racially integrate that plant. That program was accomplished before the effective date of the Act. The Legal Department of L.O.F. subscribed to the publications of BNA and its Daily Labor

Report. The E.E.O.C. guidelines of November 1965 were copied from a Report of BNA and distributed to the officers of L.O.F. in the same month. Although the officers of the company did not receive daily the full text of the BNA reports, they would receive a digest of them from the Legal Department. They then could call and get a full text right away. It was the responsibility of the Vice-President for Employment Affairs to keep the heads of plants and departments fully aware of new regulations and changes in old ones in labor matters by use of memoranda and meetings of plant managers. Some of the meetings were attended by union representatives.

When the *Raitz* charge against the East-Toledo plant was filed with E.E.O.C. in February of 1968, the matter went to conciliation in the course of which it was recognized that L.O.F. was in compliance in Toledo because of the 1965 Guidelines of E.E.O.C. In 1968 both in Toledo and in Ottawa some changes were begun in anticipation of the possibility that state protective laws might be found in conflict with the 1964 Act. When E.E.O.C. changed its guidelines in 1969 L.O.F. and the union immediately set upon a program of abolishing the separate employment system in Ottawa. This they did voluntarily. They had relied upon the guidelines in good faith.

There was substantial and pursuasive testimony by Wayne Yarman, Executive Vice-President of the International, to the effect that the union relied upon E.E.O.C.'s guidelines as had L.O.F., and, through its education program, kept its locals, including the defendant Local 19, aware on a regular basis of the changes that could be effected from time to time as a result of position changes made by E.E.O.C. It was the opinion of the International Union from the time of the enactment of Title VII that state protective laws should be obeyed. This belief it communicated to Local 19 as soon as it was confirmed in 1965 by E.E.O.C.'s guidelines. That Local 19 was also following E.E.O.C. guidelines from the beginning was confirmed

through correspondence and personal contacts between Mr. Yarman and Joe Corrigan, the head of Local 19. Mr. Yarman attended a civil rights conference in Washington on November 22, 1965 at which the E.E.O.C. made available copies of a release it had made that day for publication approving compliance with state female employment protection laws. This together with a memorandum of the conference he forwarded to the locals, including Local 19, through Joe Corrigan. This reliance continued until E.E.O.C. revised its guidelines in 1969, and again the International, according to Mr. Yarman, relied upon the opinions as set forth from time to time by E.E.O.C. Again as a matter of regular union policy the locals, including Local 19 followed through upon the advice of the International as the policymaker of the union.

It is unnecessary to recite in detail all of the testimony regarding this issue. It should suffice to state in summary that the evidence is overwhelming that for both L.O.F. and Local 19 reliance on the guidelines of E.E.O.C. was in fact in good faith.

CONCLUSION

From all of the above I conclude that the plaintiffs have proved a *prima facie* case of sex discrimination in defendant's employment practices that started long before the enactment of the Equal Opportunities Act of 1964 and continued until they were voluntarily discontinued by the defendants on March 5, 1970. The Act of 1964 in almost constitutional language outlawed sex discrimination in employment, but cognizant that what was being dealt with across the country was a custom or tradition of many decades, and that a commission with quasi-legislative power would be needed to effect great change carefully and understandingly, established the Equal Employment Opportunities Commission with regulatory powers and authority to interpret the statute progressively.

Many years before 1964, progressive states includ-

ing Illinois had also enacted legislation to protect women against certain types of hazards, improprieties and inequities in employment. Before 1964 the defendants found that their employment practices regarding women aided them in complying with the female employment protection laws of Illinois.

Before the effective date of the Act of 1964, defendants became aware that there was a conflict between their practices under the Illinois law and the federal law, and watched for the earliest advice from the E.E.O.C. This came in a form of guidelines published in July of 1965, which guidelines in effect stated that if an employers employment program for women is mandated by or in furtherance of compliance with the female employment practices laws of the state, such practices may be continued. In reliance on this advisory the defendants continued their employment program until in November of 1969 the E.E.O.C. changed its position and in a new set of published guidelines advised that the state laws were no longer in step with progress being made toward equality between men and women, and should be disregarded by employers. Immediately and voluntarily the defendants set about devising a program of change to bring their practices strictly in line with the Act of 1964. This was accomplished by March 5, 1970.

Eleven days later, the plaintiffs started the charges out of which this case grew, alleging violations of the federal law from its effective date and asking as damages two and one-half millions of dollars representing back wages they feel they could have earned had over those years they had been treated as men.

I conclude that the defendants have proved by a preponderance of evidence reliance upon the Illinois laws in support of their practices, and reliance upon the guidelines of E.E.O.C. itself in continuing their reliance upon the state law. I conclude that the government is

equitably estopped from claiming that the defendants violated the Act of 1964, and that the individual plaintiffs, although they established a *prima facie* case under the Act, are equitably estopped from asking damages, in the form of claimed back wages or any other form.

This case is before this court in Equity. Even in actions at law this circuit has applied the doctrine of equitable estoppel against the government when to do otherwise would expose private citizens to gross injustices. (See decision in *Portmann v. U.S.*,) slip opinion, 7th Cir., No. 81-1390, March 24, 1982 and cases cited therein). Judge Young of the Nothern District of Ohio in the *Raitz* case, *supra*, and the thinking of the members of the Supreme Court in *Albemarle*, *supra* (including concurring opinions) leave no doubt about the propriety of the action being taken herein. The E.E.O.C. in all fairness should not be heard to condemn defendants for having followed its guidelines; and the defendants having further established that their reliance both on the Illinois Female Employment Statute and the guidelines of E.E.O.C. was in fact in good faith, the individual plaintiffs (Lorraine Le Beau, et al.) should not be permitted to reap a financial harvest out of conduct concerning which they never complained until after it was voluntarily discontinued when E.E.O.C. withdrew its approval.

Accordingly judgment is entered for the individual plaintiffs on their complaint as far as liability, but in favor of the defendants on the question of back wages. Judgment is entered in favor of the defendants and against the E.E.O.C. on all issues.

E N T E R:

JAMES B. PARSONS
United States District Court Judg

DATED: March 31, 1982.

APPENDIX F

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

ection 703(C), 42 U.S.C. 2000e–2. Unlawful employ-ent practices

Employer practices

(a) It shall be an unlawful employment practice for an mployer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an mployment agency to fail or refuse to refer for employ-ent, or otherwise to discriminate against, any individual ecause of his race, color, religion, sex, or national origin, r to classify or refer for employment any individual on the asis of his race, color, religion, sex, or national origin.

Labor orgniazation practices

(c) It shall be an unlawful employment practice for a abor organization–

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any

way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for

a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

Section 706 (k), 42 U.S.C. 2000e-5 Enforcement Provisions

Attorney's fee; liability of Commission and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 14, 1972, 86 Stat. 104.

Section 713(b), 42 U.S.C. 2000e-12. Regulations; conformity of regulations with administrative procedure provisions; reliance on interpretations and instructions of Commission

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5.

(b) In any action or proceding based on any alleged

unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

Pub.L. 88-352, Title VII, § 713, July 2, 1964, 78 Stat. 265

APPENDIX G

THE ILLINOIS FEMALE EMPLOYMENT ACT

§ 5. Limitation on hours of labor of females

No female shall be employed in any mechanical or mercantile establishment, or factory, or laundry, or hotel, or restaurant, or barber shop or beauty parlor, or telegraph or telephone establishment or office thereof, or in any place of amusement, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or in any public or private institution or offices thereof, incorporated or unincorporated in this State, more than eight hours during any one day nor more than forty-eight (48) hours in any one week. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four hours of any day.

1909, June 15, Laws 1909, p. 212, § 1; 1911, June 10, Laws 1911, p. 328, § 1; 1937, July 1, Laws 1937, p. 550, § 1.

§ 6. Penalty

Any employer who requires or permits any female to work in any of the places mentioned in Section 1 of this act[1] more than the number of hours provided for in this act, during any day of 24 hours, or who fails, neglects or refuses so to arrange the work of females in his employ that they shall not work more than the number of hours provided for in this act, during any one day, or who permits any overseer, superintendent or other agent of any such employer to violate any of the provisions of this act, or who in violation of paragraph (f) of Section 1 1/2[2] deducts the excess worked in one day from any subsequent regularly scheduled employment time shall be guilty of a misdemeanor and upon conviction thereof shall be fined for each offense in a sum of not less than 25.00 or more than

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[1] Chapter 48, § 5

[2] Chapter 48, § 5.1.

$100.00.

1909, June 15, Laws 1909, p. 212, § 2; 1911, June 10, Laws 1911, p. 328, § 1; 1967, Aug. 3, Laws 1967, p. 2607, § 1.

APPENDIX H

EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

29 C.F.R. Part 1604
30 Fed. Reg. 14926 (December 2, 1965)

Chapter XIV–Equal Employment Opportunity Commission

Part 1604–GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

By virtue of the authority vested in it by Section 713(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(b), the Equal Employment Opportunity Commission hereby amends Chapter XIV of Title 29 of the Code of Federal Regulations to add a new Part 1604, entitled Guidelines on Discrimination Because of Sex. Because the provisions of the Administrative Procedure Act (5 U.S.C. 1003) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date, are inapplicable to these interpretative rules, they shall become effective immediately and shall be applicable with respect to cases presently before or hereafter filed with the Commission.

The new Part 1604 reads as follows: *Introduction.* The following guidelines are interpretations of the Commission published pursuant to Section 713(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(b), and § 1601.30 of the Commission's regulations, 29 CFR 1601.30.

The Commission has proceeded with caution in interpreting the scope and application of Title VII's prohibition of discrimination in employment on account of sex. We are mindful that there is little relevant legislative history to serve as guide to the intent of Congress in this area. Also, there is little light in the experience with state statutes. An overly literal interpretation of the prohibition might disrupt longstanding employment practices required by state legislation or collective bargaining agreements without achieving compensating benefits in progress

towards equal opportunity.

These guidelines are an effort to temper the bare language of the statute with common sense and a sympathetic understanding of the position and needs of women workers. Nevertheless, where the plain command of the statute is that there be no artificial classification of jobs by sex, the Commission feels bound to follow it, notwithstanding the fact that such segregation has, in particular cases, worked to the benefit of the woman worker.

Probably the most difficult area considered in these guidelines is the relation of Title VII to state legislation designed originally to protect women workers. The Commission cannot assume that Congress intended to strike down such legislation. Yet our study demonstrates that some of this legislation is irrelevant to present day needs of women, and much of this legislation is capable, in particular applications, of denying effective equality of opportunity to women.

Title VII, which makes suspect any sex distinction in employment, and state protective legislation, which requires special treatment for women, represent competing value judgements which cannot easily be harmonized. Clarification and improvements can however be achieved. We believe it desirable–even essential–that Congress and the state legislatures address themselves to this problem. State legislatures will find archaic provisions in their laws which should be updated. And the Congress may wish to determine how much weight should be given to outmoded laws whose practical effect today is not so much to protect as to disadvantage.

The many State commissions on the Status of Women, which have expressed concern that some protective laws may have lost their rationale, may wish to make appropriate recommendations to State legislatures. The Women's Bureau of the Department of Labor, which has been studying these laws, should soon have available a

definitive analysis with special emphasis on the relevance of these laws to current technology and women's increasingly important role in society.

Sec.

1604.1 Sex as a bona fide occupational qualification.

1604.2 Separate lines of progression and seniority systems.

1604.3 Discrimination against married women.

1604.4 Job opportunities advertising.

1604.5 Employment agencies.

1604.6 Pre-employment inquires as to sex.

1604.7 Relationship of Title VII to the Equal Pay Act.

Authority: The provisions of this Part 1604 are issued pursuant to Sec. 713(b), Civil Rights Act of 1964, 73 Stat. 265.

RULES AND REGULATIONS

§ 1604.1 Sex as a bona fide occupational qualification.

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels–"Men's jobs" and "Women's jobs"–tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such

stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

(iv) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification exception unless the expense would be clearly unreasonable.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., and actor or actress.

(3) Most States have enacted laws or administrative regulations with respect to employment of women. These laws fall into two general categories:

(i) Laws that require that certain benefits be provided for female employees, such as minimum wages, premium pay for overtime, rest periods or physical facilities:

(ii) Laws that prohibit the employment of women in certain hazardous occupations, in jobs requiring the lifting of heavy weights, during certain hours of the night, or for more than a specified number of hours per day or per week.

(b) The Commission believes that some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the women worker in our economy. We shall con-

tinue to study the problems posed by these laws and regulations in particular factual contexts, and to cooperate with other appropriate agencies in achieving a regulatory system more responsive to the demands of equal opportunity in employment.

(c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. So, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women.

(1) An employer, accordingly, will not be considered to be engaged in an unlawful employment practice when he refuses to employ a women in a job in which women in a job in which women are legally prohibited from being employed or which involve duties which women may not legally be permitted to perform because of hazards reasonably to be apprehended from such employment.

(2) On the other hand, an employer will be deemed to have engaged in an unlawful employment practice if he refuses to employ or promote a women in order to avoid providing a benefit for her required by law–such as minimum wage or premium overtime pay.

(3) Where state laws or regulations provide for administrative exceptions, the Commission will expect an employer asserting a bona fide occupational qualification pursuant to this paragraph to have attempted in good faith, to obtain an exception from the agency administering the

state law or regulation.

§ 1604.2 Separate lines of progression and seniority systems.

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vise versa.

(b) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by memebers of either sex into jobs which members of that sex would reasonably be expected to perform.

APPENDIX I

RULES AND REGULATIONS

Title 29 — LABOR
Chapter XIV — Equal Employment Opportunity Commission

PART 1604 — GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

Sex as a Bona Fide Occupational Qualification

By virtue of the authority vested in it by section 713(b) of the Act, 42 U.S.C. § 2000e–12(b), the Commission hereby amends Title 29, Chapter XIV, § 1604.1 (a)(3), (b), and (c) of the Code of Federal Regulations by revoking said paragraphs and substituting in lieu thereof a new § 1604.1(b).

Because the provisions of the Administrative Procedure Act (5 U.S.C. 1003) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date, are inapplicable to these interpretative rules, the amendment shall become effective immediately and shall be applicable with respect to charges presently before or hereafter filed with the Commission.

§ 1604.1 Sex as a bona fide occupational qualification.

(a) . . .

(3) [Revoked]

(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of, the night, or for more than a specified number of hours per day or per week.

(2) The Commission believes that such State laws and

regulations. although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(c) [Revoked]

(Sec. 713. 78 Stat. 265, 42 U.S.C 2000e–12)

This amendment is effective upon publication.

Signed at Washington, D.C., this the 15th day of August 1969.

[Seal] WILLIAM H. BROWN III,
Chairman.

[P.R. Doc. 69–9840: Filed, Aug. 18, 1969: 8:50 a.m.]

Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1623

In the Supreme Court of the United States

OCTOBER TERM, 1986

LOCAL 19, UNITED GLASS AND CERAMIC WORKERS, PETITIONER

v.

LORRAINE LE BEAU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

23pp

QUESTION PRESENTED

Whether, on the particular facts of the case, the Equal Employment Opportunity Commission's prosecution of this Title VII suit was so frivolous, unreasonable, or without foundation that attorneys fees could properly be awarded to the prevailing defendants.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B39) with respect to the attorneys fees issue is reported at 799 F.2d 1152; the opinion of the court of appeals (Pet. App. D1-D20) with respect to the merits is reported at 727 F.2d 141. The opinion of the district court (Pet. App. C1-C7) with respect to the attorneys fees issue is unofficially reported at 36 Fair Empl. Prac. Case. (BNA) 910; the opinion of

the district court (Pet. App. E1-E28) with respect to the merits is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1986. A petition for rehearing was denied (Pet. App. A1-A2) on January 7, 1987. The petition for a writ of certiorari was filed on April 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Libbey-Owens-Ford Company (LOF) has operated two automobile glass manufacturing plants in Ottawa, Illinois since the early 1930s (Pet. App. E10). From the beginning, LOF was subject to the requirements of the Illinois Female Employment Act (Ill. Rev. Stat. ch. 48, para. 5 (1945)), which made it unlawful to employ a woman for more than eight hours in any one day or more than 48 hours in any one week,[1] and limited the employment opportunities of females at the Ottawa plants (Pet. App. E11-E12). Specifically, LOF hired women only for a limited number of jobs in its "Plant No. 7," where automobile windshields and other auto-related glass products were manufactured, and to certain jobs in its "Plastics and Assembly" departments, where glass was laminated with plastic to make it shatterproof (Tr. 2776, 2782, 3065-3069). Senior women worked full-time in these "female positions"; junior women were maintained on an "extra board" list and sum-

[1] The pertinent provisions of the Illinois Female Employment Act are reprinted at Pet. App. G1-G2. The statute was enforceable by criminal penalties (*ibid.*).

moned to work only when a replacement or extra worker was needed; and a separate system of assignment, layoff, and recall was maintained for all female employees (Pet. App. B4, E11-E13). Petitioner, Local 19, United Glass and Ceramic Workers, was the exclusive collective bargaining representative of male and female production workers at the Ottawa plants during this period and approved of LOF's gender-based employment practices (*id.* at E10-E13).

When Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, however, LOF and petitioner became concerned that the gender-based employment practices put in place at the Ottawa plants might be challenged as unlawful (under the new federal law) (Pet. App. E24). They instructed their personnel managers and business representatives, respectively, to continue to comply with the Illinois Female Employment Act pending the issuance of guidelines by the Equal Employment Opportunity Commission (EEOC) concerning the requirements of Title VII (*id.* at E24-E26). EEOC issued those guidelines in December 1965, stating, in pertinent part, that it did "not believe that Congress intended to disturb [state] laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard," and that EEOC would "consider limitations or prohibitions imposed by such laws or regulations as a basis for application of the bona fide occupational qualification exception" of Title VII (29 C.F.R. 1604.1(c) (1965)).[2] After these guidelines were promulgated,

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[2] The EEOC's December 1965 guidelines are reprinted in full at Pet. App. H1-H6. The "bona fide occupational quali-

LOF and petitioner maintained without further inquiry or modification the extant hiring, assignment, and layoff practices at the Ottawa plants (Pet. App. B17-B19, B35-B36, D5-D7, D14-D16, E24-E26).

In August 1969, however, EEOC reversed its position and amended its guidelines to provide that state laws that prohibit or limit the employment of females "conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception" (29 C.F.R. 1604.1(b)(2) (1970)). Accordingly, LOF and petitioner determined that they had to eliminate the gender-based employment practices at the Ottawa plants and entered into negotiations to do so (Pet. App. E27; see also *id.* at D7). By March 5, 1970, LOF was hiring, assigning, and laying off employees at the Ottawa plants without regard to gender (*id.* at D7, E27).[3]

2. On March 16, 1970, a female employee from one of the Ottawa plants, supported by 45 other female employees, filed a charge of employment discrimination with EEOC (Pet. App. D8) and, on

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fication" (bfoq) exception of Title VII is codified at 42 U.S.C. 2000e-2(e) and provides, in pertinent part, that "it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of [their] * * * sex * * * in those instances where * * * sex * * * is a bona fide occupational qualification *reasonably necessary* to the normal operation of that particular business or enterprise" (emphasis added).

[3] The Illinois Female Employment Act was invalidated in *Caterpillar Tractor Co.* v. *Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970).

August 3, 1971, after receiving a right-to-sue notice, filed a class action against LOF and petitioner, alleging that the gender-based employment system in place at the Ottawa plants during the 1965-1970 period had been maintained in violation of, and that LOF and petitioner were continuing to violate, Title VII (*ibid.*). The private female plaintiffs prayed that the court award them back pay and other injunctive relief (*ibid.*). The EEOC intervened in the suit in May 1975, and joined in the private plaintiffs' allegations of continuing discrimination and prayers for monetary and injunctive relief (*id.* at B4-B5, D9-D10, E3, E13-E14).

In their answers, LOF and petitioner did not deny that they had discriminated against female employees during the 1965-1970 period. Rather, they asserted, as an affirmative defense, that the challenged gender-based employment practices had been used to comply with the Illinois Female Employment Act and that, in doing so, LOF and petitioner had justifiably relied on the EEOC's 1965 guidelines (and, accordingly, were immune (under 42 U.S.C. 2000e-12(b))[4] from liability) (Pet. App. B6, B17, E15). The EEOC countered that the particular gender-based employment practices being challenged were not mandated by the Illinois Female Employment Act, that less restrictive alternatives were available, and that LOF and petitioner had used and were continuing to

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[4] 42 U.S.C. 2000e-12(b) provides, in pertinent part, that "no person shall be subject to any liability or punishment for or on account of * * * the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission."

use the Illinois statute and the 1965 guidelines as a pretext for otherwise unjustifiable employment discrimination (*id.* at B17). Although it did not dispute that the discriminatory practices had been abolished in 1970, EEOC did not abandon its claim of continuing discrimination until October 1978 (*id.* at B16 & n.11).

In this posture, the district court denied motions by LOF and petitioner to dismiss or for summary judgment and docketed the case for trial (Pet. App. B5). At trial, neither LOF nor petitioner asserted or attempted to prove that overtime was required in all jobs from which females were excluded at the Ottawa plants (*id.* at B18 n.12). Rather, they attempted to show that, where any position in a continuous production department (i.e., a department other than the Plastics and Assembly departments) required overtime, the entire department had to be considered appropriate for only male employees (*ibid.*). Their witnesses testified that, under the "90-day change" procedure of the seniority system,[5] employees had to be able to perform every job (including jobs requiring overtime) in their respective departments and that, because of the continuous nature of the production process (together with the expense of providing fringe benefits), it was impractical to rely upon part-time employees to fill recurrent overtime needs in departments other than Plastics and Assembly (*ibid.*; see also *id.* at D4-D6, E12, E15). In rebuttal, the EEOC attempted to show: that there

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[5] Under the "90-day change" procedure, employees were entitled every 90 days to "bump" less senior employees from particular jobs in their respective departments. See Pet. App. B18 n.12; Tr. 2807-2808, 3099-3100.

were other departments (besides Plastics and Assembly) that required little overtime work; that LOF had merely imported the gender-based employment system in place in the Ottawa plants from its Toledo, Ohio plant (where the state law protecting females was more restrictive than was the Illinois Female Employment Act); that employees at the Ottawa plants considered overtime desirable and often performed overtime on jobs on which they had not worked the first eight-hour shift; and that neither LOF nor petitioner had seriously examined any less discriminatory alternative employment systems (*id.* at 17-18 & n.12, B37 n.13; Tr. 3143-3146).[6]

The district court rendered judgment for LOF and petitioner in March 1982 (Pet. App. E1-E28). It found "substantial and persuasive testimony * * * that the use of part-time employment, separate seniority lists and employment in Plastics and Assembly only[] [was] crucial to [LOF] in a good faith, determined effort on its part to comply with the Illinois Female Employment Act" (*id.* at E22), and that "the evidence is overwhelming that for both [LOF] and Local 19 reliance on the guidelines of [EEOC] was in fact in good faith" (*id.* at E26). The Seventh Circuit affirmed that judgment (Pet. App. D1-D20), reasoning that, under the EEOC's

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[6] Although EEOC did not offer any proof concerning the feasibility of any such alternatives, it suggested that LOF and petitioner could have considered modifying the "90-day change" procedure so that women could occupy jobs in other departments not specifically requiring overtime, using an "extra board" in departments other than Plastics and Assembly, or simply denying women the right to bump into jobs requiring overtime. See Tr. 2811, 3140-3141, 3143-3146, 3166, 3174, 3186, 3188-3190.

guidelines, employment practices designed to comply with state "female protective" legislation could form the basis of a bona fide occupational qualification (*id.* at D13), that the employment system in place at the Ottawa plants "me[]t the definition of 'a bona fide occupational qualification reasonably necessary to the normal operation' of LOF's business" (*id.* at D13-D14), and that, "[l]ooking at the record as a whole and without regard to whether the 'clearly erroneous' test be applied or not, there is no basis for setting aside the finding of the District Court that [LOF and petitioner] relied in good faith on the 1965 EEOC guidelines" (*id.* at D16).

3. On remand, the district court awarded attorneys fees to LOF and petitioner for their defense of the trial and appeal of this action (Pet. App. C1-C7). It ruled (*id.* at C2-C4) that "the suit by the EEOC was frivolous, unreasonable, [and] groundless" within the meaning of this Court's decision in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), reasoning that: (a) "[f]or the EEOC this case clearly was not one of first impression," since a similar challenge to LOF's gender-based employment practices had been rejected in *Raitz* v. *Libbey-Owens-Ford Glass Co.*, No. 70-99 (N.D. Ohio Sept. 23, 1973) (Pet. App. C2-C3); (b) "there was no real threat [of injury to the female class] because any discriminatory practices regarding women employees * * * had ceased in March of 1970, twelve years before trial and five years before the EEOC's intervention" (*id.* at C3); (c) "for the EEOC to have proceeded with this case in light of its own guidelines was the apex of unreasonableness" (*id.* at C4); and (d) "the appeal on these issues was as unreasonable as the pursuit of these issues at the trial court level" (*id.*

at C5). The court awarded $132,877 and $181,100 in attorneys fees to petitioner and LOF, respectively (*id.* at C7).

4. On appeal, a divided panel of the Seventh Circuit reversed (Pet. App. B1-B39). The majority noted that "a prevailing defendant [may] recover fees only upon a showing that 'the plaintiff's action was frivolous, unreasonable, or without foundation * * * or that the plaintiff continued to litigate after it clearly became so' " (*id.* at B7 (quoting *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. at 421-422)). The majority further noted that "[t]he decision whether or not to award attorneys' fees is committed to the discretion of the district judge * * * and never lightly reversed" (Pet. App. B7 (citation omitted)). But the majority detected error in each of the district court's reasons for awarding attorneys fees and thus concluded that this was one of those exceptional cases in which an abuse of discretion should be found (*id.* at B8-B9).

a. The majority began its analysis by criticizing the district court's statement that the decision in *Raitz* v. *Libbey-Owens-Ford Co.*, *supra*, was a factor rendering this suit frivolous (Pet. App. B9-B12) The majority noted that, earlier in this case, the district court had denied motions by LOF and petitioner to dismiss and for summary judgment on the ground that, in contrast to the *Raitz* case, questions of material fact existed concerning whether LOF and petitioner had relied in good faith on the EEOC guidelines and the Illinois Female Employment Act (*id.* at B10-B11). While unwilling "to suggest * * * that no suit that survives a motion for summary judgment can ever be found frivolous" (*id.* at B12 n.7), the majority found "highly inconsistent" the district

court's reasons for doing so here, since that court had previously held that the *Raitz* case was not an "impediment to bringing this suit" (*ibid.*).

The majority similarly rejected the district court's suggestion that "there was no 'real threat of injury' to the women plaintiffs because the discrimination had ended before they brought their suit" (Pet. App. B12). The majority noted that "damage suits are not by their nature more frivolous than suits for injunctions" (*ibid.*) and that, "[i]f the district court had believed that the women had suffered no cognizable injury, there would have been no need to address the affirmative defenses of good faith reliance" (*id.* at B13). The majority was therefore unwilling to "place great weight on the district court's 1984 finding that there was 'no real threat of injury' to the plaintiffs" (*id.* at B14).

The majority next found the district court's "assessment of the merit of the EEOC's suit * * * [to be] flawed" (Pet. App. B15). The majority noted that "the district court sent this case to trial on the premise that the EEOC was not simply 'condemning [LOF and petitioner] for having followed its guidelines[,]' but rather was seeking to establish that [they] were using the guidelines as a pretextual justification for their discriminatory practices" (*ibid.* (citations omitted)). The majority then determined that, "although a review of the record * * * [reveals] that the EEOC did not always manage this case as wisely as it now claims or as one might wish, it also shows that [EEOC] did not bring or conduct this suit in a manner that could be labelled 'frivolous' or 'unreasonable' " (Pet. App. B16-B17 (footnote omitted)). The majority reasoned (*id.* at B18-B19 n.12 (emphasis in original)) that EEOC had "put

in *some* evidence tending to show that the asserted 'reliance' [on the Illinois Female Employment Act and the 1965 EEOC guidelines] was merely pretext," noting that "EEOC elicited testimony suggesting that when LOF opened its Ottawa plant it simply imported the 'extra board' system from Toledo, where LOF was subject to a more stringent Ohio protective statute," that "[t]here was also testimony that suggested that LOF did not endeavor to tailor its operations closely to the requirements of the Illinois statute," and that "[i]n fact between 1965 and 1970 LOF never considered *any* alternative to the extra board system."

Finally, the majority found error in the district court's ruling that LOF and petitioner "were entitled to attorneys' fees for defending a frivolous appeal" (Pet. App. B19). The majority noted that, "[o]n appeal, the EEOC argued * * * that the district court had incorrectly concluded the 'good faith reliance' issue by inquiring whether LOF in fact used these employment practices * * * instead of asking whether LOF *had to* use these practices to avoid violating the statute," that LOF and petitioner "had not proven their actual reliance upon the 1965 guidelines," and that "the 1965 guidelines 'did not authorize' defendants' employment practices" (*ibid.* (emphasis in original)). The majority then said that, although the panel on the prior appeal had rejected these arguments, "[the] rejection of the EEOC's arguments does not, without more, make them frivolous" (*ibid.*) and that, viewed in context, the "EEOC's appellate position * * * was [not] frivolous, unreasonable or without foundation" (*id.* at B23).

b. Judge Eschbach dissented (Pet. App. B24-B39). He agreed with the majority that attorneys fees may be awarded to a prevailing defendant only where a plaintiff's suit "has no reasonable basis, whether in fact or law" (*id.* at B24 (citations omitted)). But a review of the record (see *id.* at B26-B38) led him to conclude that there was a "complete absence of any reasonable evidence on the part of the EEOC to support its claims" and, accordingly, "that the EEOC could not have reasonably believed that it could rebut LOF's defense" (*id.* at B26). In such circumstances, he believed that the court should "affirm the district court's award of attorney's fees to LOF and [petitioner]" (*id.* at B39).

ARGUMENT

The decision below does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision below turns on the particular facts of the case, establishes no new principle of law, and thus has no significant precedential value. In such circumstances, review by this Court is neither necessary nor warranted.

1. Petitioner first suggests (Pet. 19-20) that, in reversing the fee award here, the court below "subtly ignor[ed]" this Court's decision in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). But the court below expressly relied on the decision in *Christiansburg Garment* in adjudicating this case: Quoting *Christiansburg Garment*, 434 U.S. at 421-422, it said that "a prevailing defendant [may] recover fees only upon a showing that 'the plaintiff's action was frivolous, unreasonable, or without foundation * * * or that plaintiff continued to litigate after it clearly became so' " (Pet. App. B7). More-

over, it noted with approval the warning in *Christiansburg Garment* that courts should avoid " 'the understandable temptation to engage in post hoc reasoning by concluding that, because the plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation" (Pet. App. B16, quoting 434 U.S. at 422). And, finally, it followed the instructions of *Christiansburg Garment* (see 434 U.S. at 431-434) in scrutinizing the reasons advanced by the district court in support of the attorneys fees awards (see Pet. App. B8-B23). Thus, whether the conclusion of the court below (that the district court abused its discretion) is correct or not, the suggestion that its decision ignores—subtly or unsubtly—the decision in *Christiansburg Garment* is unfounded.

2. Petitioner further errs in suggesting (Pet. 23-24) that the court below erred in holding that attorneys fees may not be awarded in cases where the court has previously denied a motion to dismiss or for summary judgment. Petitioner's premise is wrong. The court below explicitly stated that it was unwilling "[to] suggest * * * that no suit that survives a motion for summary judgment can ever be found frivolous" (Pet. App. B12 n.7). It held only that the reasons the district court gave *in this case* for denying the motions to dismiss or for summary judgment and for finding the EEOC's prosecution "frivolous" were "highly inconsistent" and, accordingly, could not support an award of attorneys fees (*id.* at B10-B12).[7] This holding is plainly correct.

[7] Specifically, the court noted that, in denying the motions to dismiss or for summary judgment, the district court had held that the *Raitz* case "was not an impediment to bringing suit" and yet, in finding the prosecution to be "frivolous," had

3. Petitioner similarly errs in suggesting (Pet. 22-23, 25-26) that the court below established a new standard for reviewing attorneys fees awards to prevailing defendants. Contrary to the petitioner's assertions, the court below did not hold that the reasonableness of a prosecution must be judged by the evidence that the plaintiff subjectively hoped to adduce at trial. The court below expressly disavowed any such holding (Pet. App. B18 n.12). It emphasized "what the EEOC 'tried to show' " only to demonstrate "that the EEOC's theory of the case ha[d] remained the same through the litigation and [was] not the product of *post hoc* rationalization" (*ibid.*). Moreover, it based its decision on its perception that the EEOC had "put in *some* evidence to show that the asserted 'reliance' [on the Illinois Female Employment Act and the EEOC's guidelines] was merely pretext" (*ibid.* (emphasis in original)). Thus, in contrast to petitioner, Judge Eschbach's dissent did not criticize the majority's decision for establishing a new standard of review in attorneys fees cases; rather, he agreed with the majority that attorneys fees may be awarded to a prevailing defendant only where a plaintiff's suit "has no reasonable basis, whether in fact or law" (Pet. App. B24) (citations omitted).[8]

4. The remainder of the petition (Pet. 20-23, 25-27) thus mirrors the dissent's claim (Pet. App. B24-B39) that, on the particular facts of this case, EEOC should not have proceeded with this prosecu-

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then criticized the EEOC for proceeding with the prosecution in the face of the adverse decision in the *Raitz* case (Pet. App. B10-B12).

[8] Judge Eschbach simply evaluated the evidence differently than did the majority. Compare Pet. App. B7-B9, with *id.* at B24, B26, B28, B35, B36, n.13.

tion and accordingly that the district court's judgment should have been affirmed. Though petitioner attempts to make a legal mountain out of this factual molehill, this claim clearly does not merit the Court's review; such a fact-bound decision establishes no new rule of law and can have no significant precedential effect.[9] In any event, the court below correctly concluded that there was a sufficient basis for a prosecution in this case.

First of all, the fact that the plaintiff in the *Raitz* case was unsuccessful in her challenge to the gender-based practices of LOF at its Toledo, Ohio plant could not support an award of attorneys fees against the EEOC in this case. The *Raitz* case involved a more stringent state "female protective" law and thus implicated an entirely different set of "good faith reliance" issues. More importantly, however, the government is under no obligation to acquiesce in non-controlling precedent from other jurisdictions—here a district court ruling in another circuit—even where it has been a party to such cases. See *United States* v. *Mendoza*, 464 U.S. 154 (1984) (the government is not subject to offensive collateral estoppel from its own unsuccessful litigation). Thus, the district court clearly erred in pointing to the *Raitz* decision as a factor making this prosecution frivolous.

The fact that LOF and petitioner abolished their gender-based practices twelve years before trial and five years before the EEOC's intervention in this case also does not support an award of attorneys fees. The EEOC alleged that, prior to their abolition, the

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[9] Petitioner in fact alleges (Pet. 22) that the decision below is "at variance" with other decisions of the Seventh Circuit. Petitioner does not, however, allege that that court has wrongly decided any subsequent case on the basis of this one or attempt to demonstrate that any such decisions are likely to ensue.

gender-based practices of LOF and petitioner unlawfully denied equal employment opportunity to female employees at the Ottawa plants. Had the EEOC been able to sustain its allegations, the female employees who were affected by these practices would presumptively have been entitled to "make-whole" relief. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). Accordingly, the district court was plainly wrong in suggesting that there was no "real injury" at issue in this litigation.

Finally, the fact that EEOC was unsuccessful in its prosecution of LOF and petitioner did not make this litigation frivolous. See *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. at 421-422. Rather, the critical question is whether there was a reasonable basis for prosecuting LOF and petitioner in this case. As the facts discussed by the court of appeals demonstrate (Pet. App. B17-B19), there was such a reasonable basis here and, accordingly, the awards of attorney fees were unwarranted. See *EEOC* v. *Kenneth Balk & Associates*, 813 F.2d 197, 198 (8th Cir. 1987) (attorney fees award inappropriate where plaintiff had "some basis" for pursuing action); *Glymph* v. *Spartanburg General Hosp.*, 783 F.2d 476, 480 (4th Cir. 1986) (same); *Mitchell* v. *Office of Los Angeles Superintendent*, 805 F.2d 844, 846-848 (9th Cir. 1986) (same); *Jones* v. *Continental Corp.*, 789 F.2d 1225, 1232-1233 (6th Cir. 1986) (same).

Specifically, LOF and petitioner conceded that they had engaged in facially discriminatory practices during the 1965-1970 period and that, pursuant to 42 U.S.C. 2000e-12(b), they had the burden of establishing (by a preponderance of the evidence) that they relied in "good faith" on the EEOC's guidelines in maintaining those practices throughout that period. Yet the facts showed that LOF and petitioner estab-

lished their gender-based employment practices before the EEOC's 1965 guidelines were even promulgated; that the guidelines merely stated that EEOC would "consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception;" and that, nonetheless, neither LOF nor petitioner performed any studies to determine how much or how frequently overtime was worked in the various departments and job-categories from which female employees were barred at the Ottawa plants or, more importantly, to determine whether the extant employment system was in fact reasonably necessary for compliance with the state law. Indeed, neither LOF nor petitioner seriously considered any alternative employment system. To the contrary, they maintained an employment system which had been imported from LOF's Toledo, Ohio plant, notwithstanding the fact that the Ohio female protective statute was more stringent than was the Illinois Female Employment Act. In these circumstances, it was not unreasonable to suggest that LOF and petitioner would be unable to establish their "good faith reliance" on the EEOC guidelines.

Indeed, even had the evidence of "good faith reliance" been more substantial, there was reason to doubt that the gender-based practices in place at the Ottawa plants were "in conformity with" the EEOC guidelines (and thus entitled to immunity under 42 U.S.C. 2000e-12(b)). As noted, the EEOC guidelines sanctioned those employment practices that satisfied the requirements of the "bona fide occupational qualification exception" of Title VII (29 C.F.R. 1604.1(c) (1965)). But the "bfoq" exception immunizes only those gender-based practices that are "reasonably necessary" to the normal operation of

the employer's business (see 42 U.S.C. 2000e-2(e)) and, as this Court has recently explained, the standard of "reasonable necessity" means that explicitly discriminatory practices must be "more than 'convenient' or 'reasonable' "; the employer (or union) must have "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [women] [are] unable to perform safely and efficiently the duties of the job involved," or that it is "impossible or highly impractical to deal with the [female] employees on an individualized basis" (*Western Air Lines* v. *Criswell*, 472 U.S. 400, 414 (1985)) (footnote omitted). See also *Dothard* v. *Rawlinson*, 433 U.S. 321, 333-334 (1977). Here, however, there was evidence tending to indicate that many jobs in the continuous production departments at the Ottawa plants did not require overtime, that many employees at the Ottawa plants considered overtime desirable and often performed overtime on jobs where they had not worked the first eight-hour shift, and that much overtime was performed by having employees work a sixth day in the week (which women were legally entitled to do). Thus, contrary to the hyperbole of the district court, it was not "the apex of unreasonableness" to suggest that these particular gender-based practices did not come within the scope of the EEOC guidelines and thus violated Title VII.

5. Nevertheless, the government must acknowledge, as did the court below (Pet. App. B16-B17), that this prosecution was not well handled by the EEOC.[10] The government believes that it should hold

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[10] The EEOC apparently adhered too long to its allegations of continuing discrimination (Pet. App. B16 & n.11, B39). In addition, in so far as the the EEOC's position below was

itself to a higher standard in challenging private action than the mere avoidance of frivolous conduct. We regret the burden imposed on petitioner, the courts below, and this Court, and have taken steps to avoid similar occurrences in the future. It remains clear, however, that under the applicable law governing awards of attorneys fees to prevailing defendants, the decision below is justified. And, in all events, the legal standards controlling here were definitively established by this Court in *Christiansburg Garment*; the question whether those standards were correctly applied to the particular facts of this case does not merit this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity Commission

JUNE 1987

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that the defendants could establish a bona fide occupational qualification only if they demonstrated that they used the "least restrictive means" available to comply with the Illinois Female Employment Act, this position was not consistent with the "reasonably necessary" language of Title VII or this Court's decision in *Dothard* v. *Rawlinson*, 433 U.S. 321, 334-337 & n.23 (1977).

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